SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 646.

JOSEPH A. BURDEAU, APPELLANT,

vs.

J. C. McDOWELL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

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1 Among the rolls, records, and judicial proceedings had in the District Court of the United States for the Western District of Pennsylvania at No. 404 May term, 1921, in equity may be found the following docket entries, to wit:

In re Application of J. C. McDowell, for the return to him of certain private books, papers, memoranda, correspondence, and other data, now in the possession of Joseph A. Burdeau, special assistant to the Attorney General of the United States, and other persons connected with and associated with the said Joseph A. Burdeau.

Attorneys: A. M. Imbrie, R. P. & M. R. Marshal, D. J. Driscoll, Joseph A. Burdeau, Thomas Patterson.

Docket entries.

Nov. 12, 1920.	Petition of Jesse C. McDowell for return of books, papers, etc., and order granting rule on Joseph A. Burdeau, special assistant Attorney General of the United States, and on United States attorney for West. Dist. of Penna., assistants, post-office inspectors, et al., to show cause, etc., ret'ble Nov. 16, 1920, at 10 a. m. f. & e.
" " "	Answer of Joseph A. Burdeau to rule filed.
" " "	Answer of D. J. Driscoll, U. S. attorney, to rule filed.
" 19, "	Hearing sur petition begun, ent.
" " "	Hearing adjourned to Nov. 22nd, 1920.
" 22, "	Hearing proceeded with and concluded, ent.
" " "	Witnesses sworn for petitioner (11);
" " "	Witnesses sworn for respondent (1);
" 22, "	Memoranda of trial filed.
" 23, "	Opinion and order of court directing that books, papers, etc., for petitioner be deposited with the clerk of court and impounded for ten days; then to be turned over to J. C. McDowell unless an appeal be taken within said 10 day period in which case the said books, etc., are to remain impounded until determination of the appeal; and further ordering that Joseph A. Burdeau, special assistant to the Attorney General and the Department of Justice, its officers, and agents, be forever restrained from presenting to any United States commissioner, grand jury, or any judicial tribunal, any of said books, etc., or copies or memoranda made therefrom.
Nov. 24, 1920.	Package containing books, papers, etc., of J. C. McDowell, received from Jos. A. Burdeau and sealed and impounded, to be released to J. C. McDowell at expiration of 10 days if no appeal be taken.

" " " Package of memoranda received from Jos. A. Burdeau sealed and impounded to be released only upon further order of court.
" " " Package containing book of notes received from Jos. A. Burdeau sealed and impounded to be released only upon further order of the court.
" 29, " Petition for appeal & order allowing same filed and entered.
" " " Assignments of error filed.
" " " Citation awarded, issued and service accepted by A. M. Imbrie.
" 30, " Testimony certified to by the court and filed.
2 Dec. 4, 1920. Order allowing supersedeas, i. e., prohibiting delivery of or inspection of any of the books, papers, data, etc., heretofore impounded pending the determination of the appeal herein to the Supreme Court of the United States, and until the further order of the Supreme Court, filed & entered.
" 7, " Stipulation waiving summons and severance on appeal, filed.
" " " Præcipe re contents of record sur appeal filed.

3 In the District Court of the United States for the Western District of Pennsylvania.

In re Application of J. C. McDowell for the return to him of certain private books, etc., now in the possession of Joseph A. Burdeau et al.

No. 404. May term, 1921. In Equity.

Filed Nov. 23, 1920.

J. WOOD CLARK, *Clerk.*

Opinion and order.

ORR, District Judge:

The petitioner seeks the return to him of certain private books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data, which he avers, in his petition, to be his private property and to have been stolen from him in the spring or early summer of this year and which are now in the hands of Joseph A. Burdeau, a special assistant to the Attorney General of the United States, and other persons connected with, and associated with, said Joseph A. Burdeau. His petition avers that it is the intention of the Department of Justice, through the said Joseph A. Burdeau and his assistants, to present to the grand jury now sitting in this district all of the said books, papers, etc., together with memoranda, data,

and other information procured therefrom, with a view to having the petitioner indicted for an alleged violation of section 215 of the Criminal Code of the United States. A rule having been
4 granted upon the petition, an answer was filed. Upon the issue raised by the petition and answer, no parole testimony was offered on the part of the representatives of the United States or by any other person respondent.

From the evidence offered by the petitioner, it must be found that the material averments of the petition have been sustained. There are in the hands of the said Joseph A. Burdeau, books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data, which are the personal property of the said petitioner and which were stolen from him, and which, by reason of said theft and the demand of the petitioner for their return, are illegally in the hands of the said Joseph A. Burdeau and his assistants.

The petitioner is entitled to the return of his said property, and as well also to the delivery to him of all books, papers, memoranda, letters, copies of letters, correspondence, diaries, and all written notes in relation to the same, or any part thereof. Therefore, an order will be made for the return and delivery of the aforesaid property to the said petitioner.

It is proper to state that, so far as appears in this proceeding, neither the said Joseph A. Burdeau nor any other officer or agent of the United States, or any of the departments, had anything to do with the search of the petitioner's safes, files, and desk, or the abstraction therefrom of any of the writings referred to in the petition, and the order made in this case is not made because of any unlawful act on the part of anybody representing the United States or any of its departments but solely upon the ground that the Government should not use stolen property for any purpose after demand made for its return.

5 It is deemed wise to afford the Government an opportunity to appeal before the return of the property to the petitioner and therefore the order will embody a provision for the suspension of a delivery to the petitioner for a period of ten days in which an appeal may be taken from the judgment of this court in this matter, at the end of which time, if no appeal be taken, the said property shall be delivered to the petitioner. If, however, an appeal be taken, the papers shall not be delivered to the petitioner until after a final determination of his right thereto by the appellate court.

Order.

It is ordered that Joseph A. Burdeau, special assistant to the Attorney General of the United States, the Department of Justice, its officers and agents, and the Post Office Department of the United States, its inspectors and agents, procure and deliver to J. Wood Clark, Esq., clerk of the United States District Court for the Western

District of Pennsylvania, all of said books, papers, memoranda, letters, copies of letters, correspondence, diaries and other data so as aforesaid stolen from the offices of J. C. McDowell at No. 1320 and 1321 Farmers Bank Building and delivered by Henry L. Doherty & Company and the said Cities Service Company, its officers, agents, attorneys, and employees, and the Quapaw Gas Company, its officers, agents, attorneys, and employees, or either of them, to the said Joseph A. Burdeau, or the Department of Justice, or any of its agents, officers, and employees, or the Post Office Department of the United States, their agents, officers, and employees, together with all copies, memoranda and data of every nature whatsoever acquired, taken from, or coming into the possession of them, or any of them, through, by the use of, or through knowledge acquired from an inspection of the said books, memoranda, letters, copies of letters, correspondence, diaries and other data so as aforesaid stolen from the offices of said J. C. McDowell at rooms 1320 and 1321 Farmers Bank Building, in the city of Pittsburgh.

That upon the delivery of all of said books, papers, etc., to the said J. Wood Clark, clerk of this court, the same shall be sealed and impounded for the period of ten days, at the end of which period the same shall be delivered to the said J. C. McDowell, his attorneys, or any of them; unless an appeal shall have been taken within said period, from the order of this court, and in such case, the said books, papers, etc., shall remain impounded until the determination of the appeal. But after the said period of ten days the said J. C. McDowell, his attorneys, or any of them, shall have the right to inspect and make such memoranda and take such data therefrom as they may desire.

It is further ordered that the said Joseph A. Burdeau, special assistant to the Attorney General, and the Department of Justice, its officers and agents, be and they are, hereby forever restrained and enjoined from presenting to any United States commissioner, grand jury, or any judicial tribunal, any of said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data, or any copies or memoranda made therefrom, or any evidence of any nature whatsoever secured through or coming in their possession as the result of knowledge obtained by them from an inspection of said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data hereby directed to be impounded.

PER CURIAM.

Nov. 23, 1920.

8 **In the United States District Court of the Western District of Pennsylvania.**

In re application of J. C. McDowell, for the return to him of certain private books, papers, memoranda, correspondence, and other data, now in the possession of Joseph A. Burdeau, special assistant to the Attorney General of the United States, and other persons connected with and associated with the said Joseph A. Burdeau.
Filed Nov. 12, 1920.

J. WOOD CLARK, *Clerk.*

To the honorable the judge of the United States District Court:

The petition of Jesse C. McDowell, of Pittsburgh, Pennsylvania, respectfully represents:

(1) That he is and has been for many years past a resident of the city of Pittsburgh, and that during all of that time has been engaged in the profession or business of consulting engineer, and that in the conduct of his said business he used and occupies offices in the Farmers Bank Building, in the city of Pittsburgh, Pennsylvania.

(2) That the said Joseph A. Burdeau is a special assistant to the Attorney General of the United States.

(3) That your petitioner is advised and believes that it is the intent and purpose of the Department of Justice, through the said Joseph A. Burdeau and his associates, to present to the grand jury now sitting in and for the Western District of Pennsylvania, for investigation an alleged violation of section 215 of the Criminal Code of the United States, on the part of your petitioner, and that in connection with said investigation it is the purpose of the said Joseph A. Burdeau and his assistants, including certain post-office inspectors, cooperating and collaborating with him, to present to said grand jury certain private books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data which are the personal and private property of your petitioner.

9 (4) That said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data were in the possession and under the exclusive control of your petitioner, in his offices in the Farmers Bank Building, in the city of Pittsburgh, and were, during the spring and summer of 1920, unlawfully, illegally, and feloniously seized, purloined, and stolen from him by certain persons participating in, furthering, and aiding the proposed investigation so as aforesaid to be made by the said grand jury, under the direction and control of the said Joseph A. Burdeau, special assistant Attorney General, and that all of said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data are now in the possession and under the control of the said Joseph A. Burdeau, special assistant Attorney General, and his assistants, and post-office inspectors, and other investigators and witnesses, who are to be used by the said Joseph A. Burdeau before said grand jury, in the proposed investigation of alleged violation of section 215 of the Criminal Code, on the part of your petitioner.

(5) That in the felonious taking of said personal and private books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data, the persons who as aforesaid purloined and stole the same, drilled your petitioner's private safes in order to secure access thereto; broke the locks upon his private desk for the purpose of securing access to the papers therein, and broke into and abstracted from the files in his said offices the private papers belonging to your petitioner therein.

(6) That since the felonious taking of said personal and private books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data, and while they have been in the possession, custody, and under the control of the said Joseph A. Burdeau, special assistant Attorney General, he, the said Joseph A. Burdeau, has used said private books, papers, memoranda, letters, copies of let-
10 ters, correspondence, diaries, and other data, as the basis and for the purpose of securing other evidence and testimony, documentary and parol, to aid him in conducting said proposed investigation aforesaid before said grand jury.

(7) That the possession of said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data by the said Joseph A. Burdeau, special assistant Attorney General, and his assistants, post-office inspectors, and others, is unlawful, and in violation of the legal and constitutional rights of your petitioner, and that the presentation to said grand jury of any of said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data, or any secondary or other evidence secured through or by the use of said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data, is a deprivation of your petitioner's constitutional rights, granted to him by the fourth and fifth amendments of the Constitution of the United States.

(8) Your petitioner therefore prays the court for an order on the said Joseph A. Burdeau, special assistant Attorney General of the United States, the United States attorney for the Western District of Pennsylvania and his assistants, and such post-office inspectors or other witnesses as may have any of such books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data, in their possession and under their control:

First. To produce the same before your honorable court.

Second. That the court order and direct that the same be delivered to, returned, and restored to your petitioner.

Third. That the court order and direct that all copies, data, and memoranda of every kind and nature heretofore made of said books, papers, letters, and so forth, be returned to your petitioner.

Fourth. That the court restrain and prohibit the said Joseph A. Burdeau, special assistant Attorney General, and his assistants, and the United States attorney for the Western District
11 of Pennsylvania, and his assistants, from presenting to said grand jury in connection with said proposed investigation, any of said books, papers, memoranda, letters, copies of letters, cor-

respondence, diaries, and other data, or any copies of other memoranda or data, taken therefrom, or any secondary or other evidence which has been secured by, through, or with the aid of any of said books, papers, data, and so forth, so as aforesaid illegally and unlawfully seized and stolen from your petitioner, and unlawfully and improperly in the possession and under the control of the Government.

JESSE C. McDOWELL.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

J. C. McDowell, the petitioner above named, being duly sworn according to law, deposes and says that the facts set forth in the foregoing petition are true and correct to the best of his knowledge, information, and belief.

JESSE C. McDOWELL.

Sworn to and subscribed before me, this 12 day of November, 1920.

[NOTARIAL SEAL.] THOMAS M. BOYD,
Notary Public.

My com. expires Ap'l. 4, 1921.

12 *Order.*

And now, to wit, November 12th, 1920, upon presentation of the foregoing petition in open court, a rule is hereby granted to show cause why the prayer of the petitioner should not be granted, and it is ordered and directed that pending the disposition of said rule that none of the private books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data taken from the offices of Jesse C. McDowell, as alleged in said petition, be presented or used before the grand jury now sitting in the Western District of Pennsylvania, and that no secondary or other evidence secured by the use of said private books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data, or other evidence secured from the use of the contents thereof be presented to said grand jury.

Returnable the 16 day of November, 1920, at 10.00 o'clock.

PER CURIAM.

13 **In the District Court of the United States for the Western District of Pennsylvania.**

In re application of J. C. McDowell, for the return to him of certain private books, papers, memoranda, correspondence, and other data now in the possession of Joseph A. Burdeau, special assistant to the Attorney General of the United States, and other persons connected with and associated with the said Joseph A. Burdeau. Filed Nov. 16", 1920. J. Wood Clark, clerk.

To the honorable, the judges of the United States District Court:

The answer of D. J. Driscoll, United States attorney for the Western District of Pennsylvania, to the petition filed on behalf of Jesse

C. McDowell in the above case respectfully sets forth as follows, answering so much of the petition as the respondent believes is necessary for him to so do.

The United States attorney above named has knowledge in a general way of the desire of the Department of Justice to present to the grand jury now sitting in and for said district certain evidence against the said Jesse C. McDowell for alleged violations of section 215 of the Criminal Code of the United States. But the matter has been assigned by the Department of Justice to Joseph A. Burdeau, special assistant to the Attorney General; and neither the United States attorney nor his assistants have any knowledge of the evidence to be presented to the grand jury, other than what has been obtained by hearsay and in the most general way. The United States attorney's office does not have in its possession, custody, or control, nor has it had at any time since the appointment of the present United States attorney any of the books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data mentioned in the petition of Jesse C. McDowell; nor upon careful inquiry
14 and investigation has the United States attorney been able to discover that any of the said books, papers, memoranda, letters, copies of letters, correspondence, dairies and other data have been in the office of the United States attorney or in his custody or control during the incumbency of any of his predecessors in this office.

While the office of the United States attorney has had some correspondence with the Department of Justice at Washington regarding this case, such correspondence has been only in the general and regular way and no mention has been made to him, either by written communication or verbally, from any source connected with the Department of Justice, showing that any officer, agent, or employee of the Department of Justice acquired any of the documents mentioned in the petition of Jesse C. McDowell in the manner mentioned in the said petition or hinted at in the said petition.

D. J. DRISCOLL,
United States Attorney.

15 UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

D. J. Driscoll, the respondent above named, being duly sworn according to law, deposes and says that the facts set forth in the foregoing answer are true and correct to the best of his knowledge, information, and belief.

D. J. DRISCOLL.

Sworn to and subscribed before me this 16th day of November, A. D. 1920.

J. WOOD CLARK,
Clerk U. S. Dist. Court.

16 United States of America, District Court of the United States, Western District of Pennsylvania.

In re application of J. C. McDowell, for the return to him of certain private books, papers, memoranda, correspondence, and other data, now in the possession of Joseph A. Burdeau, special assistant to the Attorney General of the United States, and other persons connected with and associated with the said Joseph A. Burdeau.

Filed Nov. 16, 1920. J. Wood Clark, clerk.

To the honorable the judges of the United States District Court:

The answer of Joseph A. Burdeau to the petition herein respectfully shows:

First. That said petition does not state or allege facts sufficient to warrant this honorable court to make an order directing the return of any of the books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data referred to in said petition or to grant either or any of the prayers of said petition; that the said petition does not allege that the books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data claimed in said petition to be the personal property of one J. C. McDowell were seized or taken by any officer or agent of the United States or any department thereof; that said petition does not allege that any Federal warrant, subpœna, or other process was issued or used to compel the production of said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data, or to authorize a search for or seizure thereof, or that the same were taken by any person acting or claiming to act under any official authority, legislative or judicial, State or Federal;

17 that said petition does not allege that Joseph A. Burdeau or any other officer or agent of the United States or any department thereof instigated or had knowledge of or suggested or was present at the alleged, unlawful, illegal, and felonious taking and seizing of the said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data; that said petition does not allege that there was any privity, understanding, or agreement between said Joseph A. Burdeau or any officer or agent of the United States, or any department thereof, and the persons alleged in said petition to have unlawfully, illegally, and feloniously seized, purloined, and stolen said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data; that the said petition does not enumerate, describe, or specify what books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data are claimed to be the personal or private property of the petitioner herein.

Saving and reserving all objections to the insufficiency of the petition herein the said Joseph A. Burdeau further answers the petition—

Second. Answering the paragraph of the petition marked (1) he alleges that he has no knowledge or information sufficient to form a belief as to the truth of the allegations stated or contained in said paragraph of said petition.

Third. Answering the paragraph of the said petition marked (2), admits that since September 1, 1920, he has been a special assistant to the Attorney General of the United States.

Fourth. Answering the paragraph of the said petition marked (3), admits that he has been instructed by the Attorney General to present to the grand jury for this district certain alleged viola-
18 tions of Federal statutes, but denies that the said Joseph A. Burdeau, as said special assistant to the Attorney General, or any other officer or agent of the Department of Justice, or of any other Federal department, has in his or their possession or intends to present to any grand jury any private papers of the petitioner which have been taken from petitioner's possession in violation of his rights under the Constitution of the United States.

Fifth. Answering the paragraph of the petition marked (4) he denies upon information and belief that the said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data were in the possession and under the exclusive control of the petitioner herein in the Farmers Bank Building in the city of Pittsburgh, and alleges upon information and belief that the same were in an office rented and maintained by the Quapaw Gas Company, a corporation, and were taken therefrom.

He denies that any person or persons unlawfully, illegally, and feloniously seized, purloined, and stole said books, papers, memoranda, letters, copies of letters, correspondence, dairies, and other data from the petitioner herein to further and aid a proposed investigation to be made by the grand jury for this district under the direction and control of said Joseph A. Burdeau, special assistant to the Attorney General, or any other Federal grand jury, or any other officer or agent or agents of the United States. He further denies that all of said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data are now in his possession and under his control, or in the possession or under the control of any of his assistants, any post-office inspectors, or other investigators or witnesses, but admits that certain, though not all, of the papers, letters, copies, and documents taken from the office of the
19 Quapaw Gas Company, from on or about the 24th day of March, 1920, up to on or about the 1st day of June, 1920, are now in his possession or under his control, and alleges, upon information and belief, that no papers, letters, or documents of any kind have been taken from the office of said Quapaw Gas Company since about the 1st day of June, 1920.

Sixth. Answering the paragraph of the petition herein marked (5), denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations made and contained in said paragraph (5) except that he has read and verily believes to be true an affidavit of William B. S. Winans, sworn to on the 15th day of November, 1920, which he especially refers to and respectfully asks to have considered as a part of this answer with the same force and effect as if herein set forth in full, which affidavit is submitted herewith.

Seventh. Answering the paragraph of said petition marked (6) he admits that he has read certain books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data which upon information were taken as aforesaid from the office of the Quapaw Gas Company, but denies that he has obtained any evidence or testimony, documentary or parol, by the use of any personal or private books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data to aid him in conducting said proposed investigation before said grand jury.

Eighth. Denies each and every allegation made and contained in the paragraph of the petition herein marked (7).

Saving and reserving all objections to the sufficiency of the petition herein said Joseph A. Burdeau further answers said petition as follows:

Ninth. Upon information and belief derived from and based upon the affidavit of William B. S. Winans aforesaid, which is hereby referred to and made a part of this separate answer to the petition herein with the same force and effect as if the same were herein set forth in full, alleges that the books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data referred to in the petition herein, were at the times mentioned in the said affidavit of said William B. S. Winans taken from an office rented and maintained by the Quapaw Gas Company and not from the private office of the petitioner herein, and the same at the time of the said taking were not in the possession or control of the petitioner.

Saving and reserving all objections to the sufficiency of the petition herein said Joseph A. Burdeau further answers said petition as follows:

Tenth. That at the time of the said alleged taking of said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data, no Federal or State warrant, subpoena or other process had been issued for the search or seizure of any private premises of the petitioner herein or for the production or use of any private papers or any other papers of said petitioner, mentioned in the said petition; that your respondent was not a special assistant to the Attorney General of the United States at the time of the alleged taking of said papers, did not in any way participate in said alleged taking, suggest or advise the same or connive at the same, and had no knowledge thereof, and upon information and belief derived from

and based upon the said affidavit of said William B. S. Winans, which is hereby referred to and made a part of this separate answer to the said petition, with the same force and effect as if set forth in full, no other officer or agent of the United States or of any department or agency thereof, advised, assisted in, suggested, connived at
21 or had knowledge of said alleged taking. Your respondent, Joseph A. Burdeau, alleges in this connection that from his knowledge of the records of the Department of Justice the matter was first reported to the Attorney General on or about the 11th day of June, 1920, and was not prior thereto reported to any other department or officer or agency of the Government.

Wherefore, the respondent, Joseph A. Burdeau, having fully answered the petition herein, prays that the same may be in all things denied and that the rule to show cause heretofore made herein be discharged.

JOSEPH A. BURDEAU.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

Joseph A. Burdeau, being duly sworn, according to law, deposes and says that the facts set forth in the foregoing answer are true and correct to the best of his knowledge, information, and belief.

JOSEPH A. BURDEAU.

Sworn to before me this 16th day of November, 1920.

JANE L. W. DONALD,
[COURT SEAL.] *Dept. Clk., U. S. Dist. Court.*

22 United States of America, District Court of the United States, Western District of Pennsylvania.

In re application of J. C. McDowell, for the return to him of certain private books, papers, memoranda, correspondence, and other data, now in the possession of Joseph A. Burdeau, special assistant to the Attorney General of the United States, and other persons connected with and associated with the said Joseph A. Burdeau.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

Personally appeared before me, Elva Staniek, a notary public in and for said county and State, William B. S. Winans, who, being by me first duly sworn, on oath deposes and says:

That he is a resident of Greenwich in the State of Connecticut, and that he is assistant general auditor of the Cities Service Company, a corporation having offices at 60 Wall Street in the city of New York; that the said Cities Service Company is a holding company, holding and owning the stock of a large number of public utilities and oil and natural gas companies operating in various sections of the United States, and that said Cities Service Company

controls the management of and operates a number of said public utility and oil and gas properties, and particularly the Quapaw Gas Company, the Empire Gas & Fuel Company, the Central Ohio Gas & Electric Company, the Dominion Natural Gas Company, the Empire Refining Company, the Empire Gasoline Company, and others.

Affiant says that as assistant general auditor of the Cities Service Company, which owns and controls the stock of the said companies and exercise a general control over the operation of each of
23 said companies, it is his duty to act in the capacity of assistant general auditor of each of said companies and to exercise supervision over the books and accounts of each of said companies, and to direct that audits of such books be made by his subordinates.

Affiant further says that he is employed and paid his salary by Henry L. Doherty & Company, a copartnership occupying offices at 60 Wall Street, New York, and that the said Henry L. Doherty & Company are operating managers of the Cities Service Company and have control of all of the corporations owned and controlled by the Cities Service Company under a contract existing between the said Henry L. Doherty & Company and the said Cities Service Company.

Affiant further says that in the early part of 1920, and some time in the month of March of said year, J. C. McDowell, of Pittsburgh, Pa., was a director of the Cities Service Company and held various executive offices in the said various oil and gas and oil-refining and pipe-line companies owned and controlled by the Cities Service Company, and that he was at that time a director and the vice president of the Quapaw Gas Company; that the said Quapaw Gas Company occupied an office in room No. 1320, Farmers Bank Building, Pittsburgh, Pa., which building was owned by the Farmers Deposit National Bank of Pittsburgh, Pa.; that the said room or office was leased by the Quapaw Gas Company from the bank, and that the rent was paid from time to time by the said Quapaw Gas Company; that the Quapaw Gas Company occupied said office, being represented there by J. C. McDowell, its vice president, who divided his time between Pittsburgh and New York and other places.

Affiant further says that the said McDowell was the head of the oil and natural gas division of the Cities Service Company, was employed by the said Henry L. Doherty & Company, and paid his salary by the said Henry L. Doherty & Company, for the purpose of supervising the oil and gas and refining and pipe-line operations of the various companies owned and controlled by the
24 Cities Service Company, the operations of which were directed and controlled by Henry L. Doherty & Company under its contract with the said Cities Service Company, and to the best of his information and belief that as such head of the oil and natural gas division of the Cities Service Company it was the duty of the said McDowell to give all of his time to the business and opera-

tions of the oil and natural gas division of the Cities Service Company and its various subsidiary corporations.

Affiant further says that from time to time the various oil and gas and pipe-line and refining companies, so owned and controlled by the Cities Service Company, made reports to and corresponded with the said J. C. McDowell at the said office of the Quapaw Gas Company in Pittsburgh, Pa., and that in exercising said supervision said McDowell used and occupied the said office of the Quapaw Company in said building in Pittsburgh and constantly received and kept and filed in said office letters, communications, and other documents relating to the business of said various subsidiary companies, and said letters, communications, reports, and other documents were and remained the property of said various companies. Affiant further says that the said office and the papers and files and correspondence and documents and reports in said office were not and never had been under the exclusive control and direction of the said McDowell, but that same were subject to the control of his superior officers in the Cities Service Company and the partners composing the firm of Henry L. Doherty & Company and the auditors who were and might be from time to time authorized or directed to examine the same.

Affiant further says that Henry L. Doherty is and has been for many years past the president of the Cities Service Company; that Frank W. Frueauff is and has been for many years its vice president; that Paul R. Jonew is and has been for many years its secretary and general auditor, and as such officers they had the right to ex-
25 amine from time to time the papers and records of the Cities Service Company in the said Quapaw Gas Company office, and the papers, records, documents, and correspondence relating to the business of the Cities Service Company and its said various subsidiary corporations which were at the times hereinafter mentioned located in the said office of the Quapaw Gas Company in Pittsburgh, Pa.

Affiant further says that during the year 1920 and for a period prior thereto, the said Frank W. Frueauff, of New York, was the president of the Quapaw Gas Company and as such had control of the business of the said Quapaw Gas Company, its offices, books, and papers, and that the said Frank W. Frueauff was, as vice president of the Cities Service Company and as a partner in the firm of Henry L. Doherty & Company, at all times the superior officer of the said J. C. McDowell, who was employed by said firm of Henry L. Doherty & Company at a salary, with additional compensation as a bonus from time to time, and who was also a director of the Cities Service Company. That the said J. C. McDowell, as the employe of Henry L. Doherty & Company, fiscal agents and managers of the Cities Service Company, was at all times subject to the direction and control of his employers and his superior officers in the Cities Service Company and to the members of the firm of Henry L. Doherty &

Company, which was composed of Henry L. Doherty and Frank W. Frueauff.

Affiant further says that during the year 1920 the said J. C. McDowell did occupy an office, being room 1321, in the said Farmers Bank Building, adjoining the said office of the Quapaw Gas Company, and that there was a connecting door between the office of the said Quapaw Gas Company and the said office of said J. C. McDowell.

In March, 1920, because of information given by one Frank M. Lowry, in substance to the effect that for years said McDowell and men under his influence, including said Lowry, had been systematically defrauding Henry L. Doherty & Company and Cities Service Company and various subsidiary companies owned
26 thereby, by receiving large secret commissions from parties selling properties to the Cities Service Company, or subsidiary companies, through said J. C. McDowell, and because of facts learned through extensive investigations conducted by Henry L. Doherty & Company and Cities Service Company, before any effort was made to secure any papers or documents whatsoever from the aforesaid office of the Quapaw Gas Company the said McDowell was discharged from his employment by said Henry L. Doherty and was thereafter compelled to resign his offices in the Cities Service Company and its various subsidiary corporations then held by said McDowell, and was directly accused of frauds upon said Henry L. Doherty & Company and said Cities Service Company.

Affiant further says that after the said McDowell was so discharged, the connection between the Cities Service Company and said McDowell being severed, he no longer occupied or had the right of access to the said office of the Quapaw Gas Company in room 1320 of the Farmers Bank Building, and that on March 25, 1920, the Farmers National Bank of Pittsburgh, Pa., owning said building, were notified by telegraph by Frank W. Frueauff, president of the Quapaw Gas Company, to ignore any instructions from J. C. McDowell respecting said office of the Quapaw Gas Company in Pittsburgh.

Affiant further says that the said J. C. McDowell was the president of the Dominion Natural Gas Company and that one Frank M. Lowry was the vice president and general manager of the Dominion Natural Gas Company, in the early part of 1920, with offices at Buffalo, New York.

Prior to that time certain facts had been ascertained by the auditing department of Henry L. Doherty & Company, acting for Cities Service Company, which led to the suspicion that the said Frank M. Lowry had been illegally receiving commissions on properties purchased as aforesaid, known as the Thorold Natural Gas Company and the United Natural Gas Company. That thereupon an
27 investigation was made of a number of purchases handled by McDowell and Lowry, and duly authorized auditors examined the books and records of subsidiary companies with which Lowry was connected. Lowry was confronted with facts disclosed by such in-

vestigation and examination and thereupon confessed that for a long period he and J. C. McDowell had received and divided secret commissions upon the sales of numerous properties to the Cities Service Company or its subsidiaries or parties acting on its or their behalf.

Among other things the said Lowry confessed that he and McDowell had received secret commissions upon the sale to said Cities Service Company of what is known as the Kentucky-Neely property and also upon the Alden-Batavia Natural Gas Company and others.

A few days prior to March 24, 1920, said F. M. Lowry, after making to Mr. Frank W. Frueauff a written confession, a copy of which is annexed hereto, marked "Exhibit A," committed suicide by drowning. On or about March 22, 1920, said J. C. McDowell returned to New York City from Hot Springs and was confronted by Frank W. Frueauff and accused in general of taking commissions on purchases of properties.

Prior to March 24, 1920, Mr. Paul R. Jones, general auditor for the Cities Service Company, interviewed Mr. L. G. Neely, of St. Marys, Ohio, from whom the Kentucky-Neely property, the Berea Pipe Line property, and others, had been purchased by Cities Service Company and its subsidiaries, and ascertained from him that the said J. C. McDowell had solicited from him secret commissions on the so-called Kentucky-Neely properties, the Berea Pipe Line Company, and other properties, and that part of said secret commissions had then already been paid to said McDowell and arrangements made for the payment of the balance.

On March 23, 1920, the Farmers Deposit National Bank was advised by C. D. Scully, a member of the Pittsburg bar, as counsel for the Quapaw Gas Company, lessees of room No. 1320 in their
28 building, that he desired to place in said room 1320 a representative of the Quapaw Gas Company to see that no papers or records were removed pending the arrival of an auditor from the Cities Service Company's office in New York City, and with their approval Mr. Harry Trout of the McGovern Detective Agency was placed in charge, together with Mr. Walter Bratlick, both acting under the direction of Major C. C. McGovern, and these representatives continued to remain in this office until Tuesday, April 6, 1920. Mr. A. M. Imbrie, attorney for J. C. McDowell, was also notified by Mr. C. D. Scully on March 23, 1920, that this would be done.

On March 23, 1920, your affiant left the New York office, arriving in Pittsburg on the morning of March 24th. He brought with him a letter signed by Frank W. Frueauff, president of the Quapaw Gas Company, authorizing affiant or his nominees to take possession of the office and any records, books or papers, and to remove such as he desired in performance of his duties as auditor, a copy of which is hereto annexed, marked "Exhibit B"; that this letter was presented to the building superintendent of the Farmers National Bank Building in the presence of C. D. Scully, and that thereafter your affiant and C. D. Scully entered the office of J. C. McDowell, room 1321, and advised Miss B. G. Melus, who was in the employ of J. C.

McDowell personally and who also received a salary from the Quapaw Gas Company, that your affiant desired to take certain records from the office in connection with certain matters revealed by F. M. Lowry, referring to his peculations and those of others. Miss Melus requested that she be allowed to consult Mr. Imbrie, attorney for J. C. McDowell, in connection with the matter, and her request was granted. Mr. Imbrie arrived at the office shortly thereafter and was made acquainted with the action desired. He agreed that certain papers which your affiant could identify as relating to company business, be removed from room 1321, under lease by J. C. McDowell, and placed in room 1320 for examination, and asked
29 that Miss Melus be allowed to see what examination your affiant made in room 1320 and to take a list of or copies of such papers as he might remove from room 1320; that while affiant denied the right of Miss Melus to interfere in any way with the taking of such papers as related to company business, affiant consented that Miss Melus might be in the office and take lists or copies of such papers as she desired which were taken by affiant, with the distinct understanding that she was not to pass upon whether or not papers related to company business, or to interfere with affiant in taking such papers as he desired.

This was assented to by Mr. Imbrie and thereupon Miss Melus and your affiant went into the office of the Quapaw Gas Company adjoining, being room 1320, and proceeded with the examination. Miss Melus opened the desk used by J. C. McDowell and directed the building superintendent to open the large safe in that room. She stated that the small safe was used for personal papers of J. C. McDowell and that he alone had the combination and she could not give access to the small safe for that reason.

During the morning and afternoon your affiant, in company with Miss Melus, examined the desk and a portion of the letter files, and certain papers were extracted, all of which Miss Melus was allowed to examine. At about five o'clock Miss Melus was ready to leave her office for the day. She was advised by affiant that he desired to work there that evening and would be glad to have her present if she so chose. She inquired whether the large safe would be examined and was asked what papers were contained in the large safe. She stated that they were all private matters, having no connection whatever with the company and that this safe need not be examined. Miss Melus decided not to return in the evening, and affiant continued the examination of the letter files, etc. Upon starting the examination of the large safe which had previously been opened by the building superintendent at the direction
30 of Miss Melus, it was found that there were many papers therein relating to the business of the company and that affiant had been misinformed regarding the contents of this safe. He then, and because of the attempted deception as to the contents of the large safe, arranged to have some one endeavor to open the

small safe by turning the combination, but this effort was abandoned, and the safe was not opened on that day or night.

Affiant left Pittsburg that night, taking with him a few papers taken from the office of the Quapaw Gas Company relating to the business of the Cities Service Company and some of its subsidiaries.

On April 5, 1920, Mr. A. M. Imbrie, attorney for J. C. McDowell, wrote a letter to Mehard, Scully & Mehard, copy of which is attached hereto, marked "Exhibit C," stating that the small safe in room 1320 was the private property of J. C. McDowell and demanding permission to remove the safe and contents, thereby admitting that the premises were not under McDowell's control and that he had no right of access to said premises. This demand was replied to by Mehard, Scully & Mehard on April 6th, acknowledging receipt of letter from Mr. Imbrie and stating that their clients, the Cities Service Company and Henry L. Doherty & Company, "have a perfect right to an examination of the contents of the safe in question as well as the contents of all other safes, filing cases, desks, etc., on the premises of their subsidiary companies." They further stated that Mr. McDowell had refused to allow an examination of the contents of the safe in question and advised that their clients, in pursuance of their audit and examination, proposed to open the safe and examine the contents. They further advised as follows: "You and Mr. McDowell or his representatives are at full liberty to be present at the examination of the contents of the safe."

At noon on Saturday, April 3rd, Mr. Mehard saw Mr. Imbrie and told him that unless the safe was opened by McDowell by
31 9.30 Monday morning with our representatives present, measures would be taken to have it opened. Mr. Imbrie asked for more time and was given until Monday afternoon at 2 o'clock. At 2 o'clock on Monday afternoon Mr. Imbrie complained that the time had been too short and stated that McDowell's New York attorney would be in Pittsburgh on the following day, Tuesday, and asked for further time. Some time after 2 o'clock a safe expert furnished by Mr. McGovern arrived at room 1320 and worked on the safe without success. On Monday, April 5, 1920, affiant informed said McGovern that Mr. Paul R. Jones and affiant would meet on Tuesday, April 6, 1920, between 9.30 and 10 o'clock, at the Farmers Bank Building for the purpose of opening said small safe, and also instructed McGovern to be present at said time on April 6th with an expert to open the safe, which was to be done in the presence of Mr. Imbrie or a disinterested third party. At the appointed time Mr. Jones and affiant arrived at the Farmers Bank Building and in front thereof met the said McGovern, who thereupon stated that McDowell's men had just been up there and opened the safe, and that those present were Miss Melus, Mr. Imbrie, his attorney, and some New York lawyer. McGovern stated that two men had gotten into the safe, which had been opened by Miss Melus, and some papers had been taken out. The man spoken of as Mr. McDowell's New York attorney was in fact a brother of Mr. Rody P. Marshall, of

Pittsburgh, of counsel for Mr. McDowell. The fact is that McGovern, who was in the room with one of his men and a safe man, all of whom were in the employ of Quapaw Gas Company, had permitted others to walk into the room and, without any resistance, allowed the safe to be opened by Miss Melus and the papers extracted. On that day Mr. McGovern and his representatives were relieved from duty and other representatives of the Quapaw Gas Company placed in charge. On that day, and after this unlawful entry by McDowell's representatives, your affiant forcibly opened the desk used by said J. C. McDowell in the Quapaw Gas Company office and removed therefrom certain papers and made a further
32 examination of the files and extracted therefrom additional papers. On a later date all papers contained in the files and desks in the company's office were removed from room 1320, and the small safe was opened by drilling a hole in the rear thereof, and in it was found only a penknife and a ten-cent piece.

Affiant further says that at the times referred to in this affidavit no action had been taken by the Cities Service Company, Henry L. Doherty & Company, or any of the subsidiaries of the Cities Service Company, or any one on its or their behalf, to report any of the aforesaid facts to the Department of Justice or any Federal office, officer, or agency, and no complaint charging the commission of a crime by said J. C. McDowell had been made or filed in any jurisdiction.

Affiant says that the attention of the Department of Justice was first called to the alleged violations of law by said J. C. McDowell on June 11, 1920; subsequent to June 11, 1920, statements and reports were made to the Department of Justice by representatives of Henry L. Doherty & Company, Cities Service Company and its subsidiaries, but no papers taken from the office of the Quapaw Company were delivered to any representative of the Department of Justice until after September 1, 1920, the date upon which the appointment of Hon. Joseph A. Burdeau, special assistant to the Attorney General of the United States, became effective.

WILLIAM B. S. WINANS.

Sworn to and subscribed before me this 16th day of November, 1920.

[NOTARIAL SEAL.]

ELVA STANIEK,
Notary Public.

My commission expires March 22nd, 1923.

33

EXHIBIT "A."

The Buffalo Club, 1867.

Mr. F. W. FRUEAUFF.

DEAR SIR: As you requested some days ago, I looked over my check book, that is what few I could find after Mr. Winans took so

many away. I find twelve at least from $250 to $10,000 that I had cashed and given to J. C. McDowell, mostly on contracts he had made but let me collect the commission and give him half.

I am not sending the checks because, as they have no marks on them, I know they would not be evidence against this party, but with the exception of the Miner deal and few small ones, he, McD., always got the one-half of any I got with the exception of one time.

As near as I can recollect anything was received from F. B. Bernard was paid McD. and he gave it to me, but he always delivered the cash, no checks, so not being up on such business and being urged on by him I must be the principal sufferer.

I am sorry I could not have gone to St. Louis to see George W. McMullin, of Pittsburgh, who told me only two or three months ago that he had personally paid McD. $250,000 commissions on the Crew-Levick purchase.

I never before took commissions in my life until I became connected with the Buffalo office through instructions from J. C. McDowell.

It has completely ruined me and I am unable to bear it; am more than sorry I betrayed your confidence, and I hold no harsh feelings against anyone on earth to-day.

Yours,

F. M. LOWRY.

Tuezday 16.

(Copy of envelope.)

Personal.

Mr. Frank W. Frueauff,
60 Wall St., N. Y.

(Cancellation stamp.)

March 17,
2 p. m.
Suspension Bridge,
1920.

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34 EXHIBIT "B."

THE QUAPAW GAS COMPANY,
FARMERS BANK BUILDING,
Pittsburgh, March 23rd, 1920.

To whom it may concern:

This letter will give authority to Mr. W. B. S. Winans, and to those whom he may name, to take possession of the office of the Quapaw Gas Company, being room #1320, Farmers' Bank Building, Pittsburgh, Pa.

He has authority to inspect and to take any records, papers, letter files or other data contained in the office leased by the Quapaw Gas Company.

Yours, very truly,

By FRANK W. FRUEAUFF,
President.

FWF/hjh.

I hereby designate C. B. Scully or C. B. Mehard or such person as they may designate to exercise the authority conferred on me in the above letter.

W. B. S. WINANS.

MARCH 24, 1920.

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35 EXHIBIT "C."

MEHARD, SCULLY & MEHARD,
1014 Frick Building, Pittsburgh, Pa.

DEAR SIRS: This is to notify you that the small safe in room 1320, Farmers' Bank Building, which is now in your possession, and from which Mr. McDowell has been excluded, is the private property of Mr. J. C. McDowell and contains valuable papers and securities, some of which are held by Mr. McDowell in trust; and that in as much as you have seen fit to take exclusive possession of this property, we will hold you and your clients responsible for any violation of Mr. McDowell's rights, or for any loss that he may sustain by reason of your illegal retention of his property.

Although we have made frequent verbal demands for said property, that is, the safe heretofore mentioned and the contents thereof, we now make this formal demand for leave to remove it.

Very truly, yours,

(Sgnd) A. M. IMBRIE,
Atty. for J. C. McDowell.

APRIL 5, 1920.
AMI/MKM.

36 (Endorsed:) In the District Court of the United States for the Western District of Pennsylvania. In the matter of the petition of J. C. McDowell, for the return of certain private books, etc. Copies: Petition of J. C. McDowell, answer of U. S. Attorney, answer of Joseph A. Burdeau, order of Nov. 23, 1920.

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37 In the District Court of the United States for the Western District of Pennsylvania.

In re application of J. C. McDowell, for the return to him of certain private books, papers, memorandum, correspondence, and other data now in the possession of Joseph A. Burdeau, special

assistant to the Attorney General of the United States, and other persons connected with and associated with the said Joseph A. Burdeau.

No. 404. May Term, 1920.

Before Hon. Charles P. Orr, judge.

APPEARANCES.

Messrs. A. M. Imbrie, Rody P. Marshall, on behalf of petitioner: Mr. Joseph A. Burdeau and Mr. A. E. Pagan, special assistants to the Attorney General of the United States, on behalf of the Government: Messrs. Patterson, Crawford, Miller, and Arensberg, representing certain witnesses who may be called, including Henry L. Doherty and others.

Filed Nov. 30, 1920, J. Wood Clark, clerk.

38 WITNESSES FOR PETITIONER.

	Direct.	Cross.
Winans, Wm. B. S	4	23
Doherty, Henry L	28	33
Frueauff, Frank W	38	45
Melus, Beatrice G	47	62
Worley, A. J	79	
" " (recalled)	115	
" " "	122	
Krull, John C	88	
Collins, George F	103	
Barnard, Frank B	107	110
Dorsey, Joseph	123	
Sheridan, S. J	129	136
Scully, Cornelius D	144	151

WITNESS FOR GOVERNMENT.

Arthur E. Brown	44	

39 In the District Court of the United States for the Western District of Pennsylvania.

In re application of J. C. McDowell for the return to him of certain private books, papers, memorandum, correspondence, and other data now in the possession of Joseph A. Burdeau, special assistant to the Attorney General of the United States, and other persons connected with and associated with the said Joseph A. Burdeau.

No. 404. May Term, 1920.

Before Hon. Charles P. Orr, judge.

And now Friday, November 19, 1920, this matter came on for hearing at 10 o'clock a. m. before Hon. Charles P. Orr, judge.

Appearances: Messrs. A. M. Imbrie, Rody P. Marshall, on behalf of the petitioner; Mr. Joseph A. Burdeau and Mr. A. E. Pagan,

special assistants to the Attorney General of the United States, on behalf of the Government; Messrs. Patterson, Crawford, Miller & Arensberg, representing certain witnesses who may be called,
40 including Henry L. Dogherty, Esq., W. B. S. Winans, Esq., Frank W. Frueauff, and others.

Mr. MARSHALL. If your honor please, in view of the time that it will take to hear all of the witnesses in this case, I desire to state what we expect to be able to prove to your honor's satisfaction:

That the two rooms in question, rooms 1320 and 1321 in the Farmers' Bank Building, were the private offices of Mr. J. C. McDowell; and that in 1913 one of these offices had been used somewhat by the Quapaw Gas Company; that the Quapaw Gas Company occasionally held directors' meetings in the room 1320 or 1321; that after 1913 the Quapaw Gas Company did pay for some time the rent for one of these offices, but that their name was never on the door, and that both of the offices were considered to be the private offices of McDowell.

In addition to that, we can show that the two safes in the offices were forced open at night time, bored by an expert safe man, and the contents thereof stolen by representative of Henry L. Dogherty and Company and a representative of the Cities Service Company, who are complainants in this case; that these papers were
41 stolen in the month of May, 1920.

That one of these offices was taken charge of by the Cities Service Company and the H. L. Dogherty Company, and Mr. McDowell was forcibly excluded therefrom from about the 24th or 25th of May, and continuously until some time in the latter part of July or down to the 15th day of July, 1920.

That subsequent to the time that the Cities Service Company and H. L. Dogherty Company and their agents forcibly took charge of this office, and before they finally stole the balance of the papers, they complained to the United States Government about Mr. McDowell; and that the papers were stolen by the representatives of the Cities Service Company and H. L. Dogherty and Company while the United States Government was investigating this matter, and that they turned over the stolen property to representatives of the United States Government, and the same afterwards came into the hands of Mr. Burdeau.

I make this statement in order that the other side—assuming that we will be able to prove these facts—if they desire to make any argument, may do so, as that may shorten the case.

42 By the COURT. Is the Government ready to concede any of the statements made by Mr. Marshall?

Mr. BURDEAU. No, sir.

By the COURT. Then you may proceed, Mr. Marshall.

WM. B. S. WINANS, a witness called on behalf of petitioner, being duly sworn, testified as follows:

Direct examination by Mr. MARSHALL:

Q. I believe you are one of the parties who made an affidavit which is annexed to the answer filed by the Government to the petition of J. C. McDowell, are you?

A. I am.

Q. And where do you live?

A. I live in Greenwich, Connecticut.

Q. By whom are you employed?

A. I am employed by the Henry L. Dogherty Company.

Q. Are you employed by the Cities Service Company?

A. Under my employment by Henry L. Dogherty & Company I am also employed by the Cities Service Company.

Q. And the Cities Service Company is a corporation which holds stock in a large number of other corporations, is it?

A. That is right.

Q. And one of those corporatons was the Quapaw Gas Com-
43 pany, was it?

A. That is one of the affiliated corporations.

Q. Well, is that one of the corporations the stock of which is owned by the Cities Service Company?

A. Your honor, may I explain in connection with that question?

By the COURT. Certainly.

A. The Cities Service Company holds a great many subsidiary companies. The Quapaw Gas Company is either owned directly by the Cities Service Company or by one of the other subsidiary companies.

Mr. MARSHALL:

Q. One of the other subsidiary corporations of the Cities Service Company?

A. Yes, that is correct.

Q. What is your connection with the Cities Service Company?

A. I am assistant general auditor of the Cities Service Company.

Q. And what position do you hold with the H. L. Dogherty Company?

A. I am employed to work for H. L. Dogherty & Company, and in turn my services are used by the Cities Service Company as assistant general auditor.

Q. And were you sent to Pittsburgh in March, 1920?

A. I was sent to Pittsburgh by Frank W. Frueauff——

44 Q. I will get to that later. Were you sent to Pittsburgh in March, 1920?

A. Yes, sir.

Q. On what date?

A. I left New York on March 22(?), 1920.

Q. Did you have any letter with you authorizing you to do any act or perform any service for the Cities Service Company or the Quapaw Gas Company?

A. I had a letter from the Quapaw Gas Company and authority from Mr. Frank W. Frueauff.

Q. And did you have authority from Mr. Frueauff to take possession of the office that you say was the office of the Quapaw Gas Company in the Farmers Bank Building?

A. I had the full authority contained in the letter given me by Mr. Frueauff.

Q. Do you have that letter?

A. It is attached, I believe, to the affidavit.

Q. Attached to your affidavit, which is attached to the answer in the case?

A. Yes, sir.

Q. Following that letter, you came on and personally took possession of one of the offices which had been occupied by Mr. McDowell?

A. Yes, sir.

Q. Which office was that?

45 A. Room 1320.

Q. Was there any name on the door of that office?

A. Yes.

Q. What name?

A. The name of J. C. McDowell.

Q. Was there any name on the other office?

A. I think so.

Q. Also J. C. McDowell?

A. I think so.

Q. The name of the Quapaw Gas Company did not appear on the door of either office?

A. I think not.

Q. When you took possession of this 1320, Mr. McDowell was not in the city, was he?

A. I don't think he was.

Q. And following your taking possession of that office, did you have a conversation with Mr. Imbrie, representing Mr. McDowell?

A. I had a conversation with Mr. Imbrie prior to that time.

Q. Was that before or after you had entered the office?

A. At the time, or practically at the concurrent time of entering the office.

Q. Then you make a distinction between the time you took exclusive possession of the office and the time that you just simply went into the office and took possession?

46 A. No; wait a minute. When I went into that office, as stated in the affidavit, or shortly thereafter, Mr. Imbrie was called over to the office, and before anything was done he came over there.

Q. Did you have an arrangement with Mr. Imbrie, who represented Mr. McDowell, to go over the files in the office at 1320 and take therefrom the papers which did not belong to Mr. McDowell,

but which belonged to the Quapaw Gas Company and the other underlying companies of the Cities Service Company?

A. That question is pretty much involved. If you could state it a little bit simpler I think I could answer it easier.

Q. All right, I will withdraw it. Did you, as the agent and representative of Dogherty and Company and the Cities Service Company, have both of the safes in this office, 1320, drilled and opened?

Question objected to by counsel for the United States, unless it be shown that at the time it was the private individual act of the witness, as a representative of the corporations named.

Counsel for witnesses object to the question, for the reason that it has not been shown that the witness was acting with any Federal authority whatever.

In support of the objections noted by both counsel, the case
47 of Weeks vs. United States, 232 U. S., was cited.

By the COURT. I will overrule the objections and note an exception.

Question read.

Mr. PATTERSON. One moment. The witness is called by the other side and we don't think should be cross-examined by them.

By the COURT. I overrule the objection.

Mr. BURDEAU. The Government objects to the question, also.

By the COURT. I will overrule the objection and note an exception.

Question read, as follows:

Q. Did you, as the agent and representative of Dogherty and Company and the Cities Service Company, have both of the safes in this office, 1320, drilled and opened?

A. No.

Mr. MARSHALL:

Q. Well, did you have either one of them drilled and opened?

A. No, sir; I did not.

48 Q. Then you had nothing to do with that? Is that correct?

A. That is correct.

Mr. PATTERSON. The question is misleading, because it assumes that the thing is done.

By the COURT. I don't think so. If the thing never occurred, then he had nothing to do with it. There is no inference to be drawn.

Mr. MARSHALL:

Q. Did you open the desk, forcibly open the desk, used by J. C. McDowell in room 1320 in Farmers Bank Building?

Mr. PATTERSON. The objection is renewed.

Objection overruled.

A. I opened the desk forcibly; yes; after it had been previously opened for my inspection with a key by a representative of Mr. McDowell.

Q. Miss Melus?

A. Miss Melus.

Q. And had you gone through the papers with her?

A. I had gone through the papers previously with her.

Q. When did you do that?

A. I did that on April the 6th: after Mr. McDowell's representatives had entered the office of the Quapaw Gas Company themselves.

49 Q. The small safe?

A. The small safe.

Q. Then, did you have anything to do with opening and drilling a hole in the rear of the small safe?

A. No.

Q. Well, did you know it was done?

A. I knew that it was done, yes, from hearsay.

Q. Whom did you leave in charge of the office 1320 when you left Pittsburgh?

A. At what time, Mr. Marshall?

Q. Well, you came here in March, you said, about the 23rd or 24th, I believe?

A. That is right.

Q. How long did you remain here at that time?

A. I left here on the night of March the 24th.

Q. Whom did you leave in charge of the office 1320 at that time?

A. Maj. C. C. McGovern, a detective.

Q. A detective here in the city of Pittsburgh?

A. Yes, sir.

Q. When did you next return to Pittsburgh?

A. My memory is not clear regarding that. I came here a few days after that, I think, but did not go to the office of the company.

50 Q. How long did Mr. McGovern remain in charge of the office 1320 Farmers Bank Building?

A. How long did he remain?

Q. Yes.

A. Until April the 6th.

Q. During that time was he subject to your orders?

A. He was supposed to be subject to the orders of the Quapaw Gas Company, through Mr. C. D. Scully, a member of the Pittsburgh bar.

Q. Attorney for the Quapaw Gas Company?

A. Attorney for the Quapaw Gas Company.

Q. And that office was kept guarded under your orders day and night, was it not?

A. It was.

Q. And no person who didn't have the permission of Mr. Scully could enter 1320 Farmers Bank Building? At least, those were your instructions?

A. That is approximately correct.

Q. Now, on the sixth of April, Mr. Imbrie and another gentleman went to the office of J. C. McDowell and took the contents from the small safe, did they?

Mr. PATTERSON. How can you prove that by this witness?

Mr. BURDEAU. That is objected to, on the ground that it assumes a state of facts not established by the evidence—that is, by
51 characterizing the premises as the office of J. C. McDowell.

By the COURT. Well, the witness has said that there wasn't any name on the door except that of J. C. McDowell. Isn't that some evidence that it was his office?

Mr. PATTERSON. Yes. But the witness can hardly answer that question.

Question read.

Mr. PATTERSON. That is assuming that it was the office of J. C. McDowell, as to which there is no proof.

Mr. MARSHALL. Then we will change it and say—went to the room 1320 in the Farmers Bank Building.

A. I can't state what they did, not having seen them myself.

Q. But you swore to that, didn't you?

A. To the best of my knowledge and belief, sir.

Q. You didn't make any statement of that kind in the affidavit here, that you didn't know personally, did you?

Mr. PATTERSON. That is objected to, as not fair to the witness.

Mr. BURDEAU. And also objected to as cross-examination of his own witness.

52 Mr. MARSHALL. He isn't our witness, he's a hostile witness.

A. May I make a statement?

By the COURT. Yes.

A. As stated very clearly in the affidavit, Mr. C. C. McGovern was present at the time the safe was opened and told me of those facts.

Mr. MARSHALL. Then who did you put in charge of this office 1320 from the sixth day of April on?

A. From that time on a man by the name of A. Worley, I think, was placed in charge of that office.

Q. He also conducts a detective agency in the city of Pittsburgh?

A. Yes, sir.

Q. And from that time on how long did he have charge of that office under your direction?

A. I don't remember, but it was up to some time in June, I should say.

Q. The 15th of July, wasn't it?

A. No; I can't say; I don't know.

Q. Well, at any rate, was he in charge of that office under your direction, from the sixth day of April, down until the papers were removed from that office and the furniture removed from
53 that office?

A. He was in charge of that office until the time that the papers were removed. I am not sure about all of the furniture.

Q. Was he there under your directions?

A. He wasn't there under my personal direction.

Q. Well, had he been employed by you?

A. No; he had not.

Q. Well, who employed him?

A. I think he was employed by Mr. C. D. Scully.

Q. Who was attorney for whom?

A. Who was attorney for the Quapaw Gas Company.

Q. Were you personally in Pittsburgh at any time after the sixth of April?

A. Yes.

Q. When?

A. I don't recollect the dates, Mr. Marshall.

Q. Well, were you ever down at this office and did you ever take papers from that office 1320 Farmers Bank Building?

A. I have stated that I was there on two days and on both of those days I took certain papers.

Q. Well, the last time you were there, did you take any papers from that office?

A. Yes.

Q. What papers did you take?

A. I can't describe the papers.

54 Q. Did you take all of the papers that were in the office?

A. I did not.

Q. And you can't tell us what the last day that you were in the office was?

A. Yes; I think I can do that. You asked me the last day I was in Pittsburgh.

Q. No; I want the last day you were in the office 1320?

A. As near as I can remember that, I was in the office of the Quapaw Gas Company, room 1320, Farmers Bank Building on April the sixth.

Q. Well, after that time were any papers delivered to you by a representative of the Worley Detective Agency?

Mr. PATTERSON. I understand that this is all under the same objection, without having to renew it?

By the COURT. Yes.

A. After that date, certain papers were delivered by representatives of Mr. Worley acting for the Quapaw Gas Company.

Mr. MARSHALL:

Q. To you?

A. To our office.

Q. As an officer of the Cities Service Company and as an employee of Henry L. Dogherty and Company?

A. They were not delivered to me personally.

55 Q. To whom were they delivered?

A. To Mr. Paul R. Jones.

Q. And what position does he hold with Dogherty & Company and the Cities Service Company?

A. Mr. Jones is general auditor for the Cities Service Company and the allied companies.

Q. Did he hold any position with the Henry L. Dogherty Company?

A. Yes.

Q. What was the name of the man who took those papers from Pittsburgh and delivered them to Mr. Paul R. Jones?

A. I do not know.

Q. Mr. Sheridan, wasn't it—I will refresh your recollection.

A. Yes; I think Mr. Sheridan did deliver some.

Q. He brought on telescopes full, didn't he?

A. No.

Q. Suitcases full, I mean?

A. He brought them. I don't know what they were in.

Q. Did you see them?

A. Yes.

Q. How many papers were there?

A. There were a great many of them.

Q. Several bushels of papers?

A. If you measure papers by the bushel.

Q. How would you measure these, if you want make a measurement of them?

56 A. There were a great many papers.

Q. Well, they would amount to several bushels of papers, wouldn't they?

A. I presume so.

Q. And how many suitcases full were brought on?

A. I do not know.

Q. Have you no idea?

A. No; I have no idea.

Q. They were delivered to Mr. Paul R. Jones where?

A. At 60 Wall Street, New York.

Q. And what is 60 Wall Street, New York?

A. 60 Wall Street is the office of the Cities Service Company and Henry L. Dogherty Company and the Quapaw Gas Company.

Q. Who was representing your two companies, Henry L. Dogherty Company and the Cities Service Company when you left Pittsburgh on April the 6th?

A. Our legal representative here was Mr. C. D. Scully.

Q. Then who else represented you?

A. In charge of the office room 1320, Mr. Worley.

Q. Was Mr. Paul R. Jones here at any time?

A. I think he was.

Q. Well, when was he here, to your knowledge?

A. I do not know.

Q. But he was here several times.

A. I think so.

57 Q. After you had taken possession of 1320, did Miss Melus open or have opened large safe in 1320 and go through those papers with you and let you take every paper that you said was not the private property of Mr. McDowell?

A. No.

Q. She didn't?

A. No.

Q. And didn't you then agree, after doing that, that the safe be closed?

A. Your honor, I have answered the question in the negative, and he then asks me to answer the question—after doing so.

Mr. MARSHALL. I will withdraw the question.

Q. Did Miss Melus open the larger safe in room 1320 at any time after you took possession of that room?

A. Miss Melus caused it to be opened.

Q. She couldn't open it because there was something wrong with the lock, wasn't there?

A. She asked the building superintendent to open the safe.

Q. Well, did he open it?

A. He did.

Q. Did you and Miss Melus then go through the papers in that safe?

A. Not together.

Q. Did you go through them?

A. I went through them later.

Q. Well, did you go through them then?

58 A. No.

Q. Well, was the safe closed again before you went through them?

A. No, sir.

Q. It was left open?

A. It was left open.

Q. When did you go through them?

A. I went through them in the evening of that day after Miss Melus had left the office.

Q. Did you abstract therefrom certain papers at that time?

A. Yes.

Q. When was the safe closed?

A. I do not know.

Q. Did you ever allow Miss Melus in the room after that?

A. I think Miss Melus was in the room after that.

Q. Yes; she was in once. But did you allow her in the room?

A. No, sir.

Q. When did you close that safe?

A. I never did close that safe.

Q. Then it was still open on the sixth of April when you were there?

A. I can't say as to that.

Q. Then you can't say whether that safe was ever closed after it was opened by the superintendent of the building, or a representative of the building, or not?

A. So far as I know it was never closed.

Q. Do you know whether that safe was bored and drilled
59 and opened after the 6th day of April, 1920?

A. I have no reason to believe that it was ever bored, for the reason that the building superintendent would have been glad to open it at any time.

Q. It was not bored?

A. It was not bored as far as I know.

Q. And it was open when you left?

A. Yes.

Q. And when did you leave that building?

A. On March 24, 1920.

Q. Did you or any person representing you instruct Mr. Scully to take the furniture and safe from that office, or to have it taken?

A. Mr. Scully was instructed, but not by me.

Q. Do you know by whom?

A. I think by Mr. Paul R. Jones.

Mr. BURDEAU. I object to that, as heresay.

Mr. MARSHALL:

Q. Is Mr. Henry L. Dogherty here in court?

A. Yes, sir.

Q. Are both Mr. Frueauffs here?

Objected to by Mr. Patterson.

A. Shall I answer that question?

60 By the COURT. Yes.

A. Yes, sir.

Mr. MARSHALL:

Q. Are you here in answer to a subpoena?

A. Yes.

Q. Where were you subpoened?

A. I was subpoened at the William Penn Hotel.

Q. But you did not come here originally in answer to a subpoena?

A. No.

Q. You came here voluntarily?

A. Yes.

Q. Then the only subpoena you are here now in answer to is a subpoena served on you by the petitioner in this case?

A. Yes.

Q. Did you tell the young man who served you with that subpoena that you had stolen those papers and that you were the thief and the man that they wanted?

Objected to by Mr. Patterson.

A. I will be glad to answer that. I smiled when he served me with those papers and I said, "I am the alleged thief."

Q. You did not, then, say to him, "I am the thief, I am the man you want. I took all of those papers?"

A. I did not.

61 Q. You did not?

A. I did not.

Q. But whatever you did, you did, as you have stated, in the course of your employment—not for yourself personally?

A. That is correct.

Cross-examination by Mr. BURDEAU:

Q. When did you first come to Pittsburgh in connection with the matters you have testified to in direct examination?

A. On March 24, 1920.

Q. How long did you remain at that time?

A. I left Pittsburgh on March the 24th, in the evening of that day.

Q. When did you first see Mr. Imbrie?

A. I first saw Mr. Imbrie on the morning of March 24, 1920.

Q. Mr. Imbrie was counsel for Mr. McDowell?

A. So I understood.

Q. Did you have a conversation with Mr. Imbrie?

A. Yes.

Q. Do you recall that conversation?

A. Yes.

Q. Can you give it in substance?

A. I think so.

Q. Please do so.

A. Mr. Imbrie was called over to the office of Mr. McDowell, which I was in at that time, room 1320, by Miss Melus; and we

62 discussed the matters that I had been sent out there to do; that I wished to take possession of the office and to probably take therefrom certain papers. Mr. Imbrie at first objected and threatened to call in a lawyer (?); and I told him that that was our private office where business was conducted legally and we proposed to take possession of it and to take such papers therefrom as I would decide were proper. And he finally agreed to it with the provision that Miss Melus should be allowed to look over the papers and if she desired to take a copy.

Q. And that was with reference to room 1320?

A. It was.

Q. After that conversation with Mr. Imbrie, what did you do?

A. Following that, Miss Melus and I started to go through the papers in room 1321, and Miss Melus took from the files certain papers that I could identify as papers relating to the business of the company, and she carried those papers into the next room and placed them on the desk for my examination. I also examined papers contained in the file of the company in the company's room, 1320, and also examined the desk, which Miss Melus opened, and later in the day examined the contents of the large safe, which had been opened by the building superintendent upon instructions by Miss Melus.

Q. Did you, in room 1321, forcibly open any piece of furniture?
A. No.
Q. Did you forcibly open any safe?
63 A. No.
Q. Did you take any papers from room 1321 other than papers that Miss Melus gave you?
A. No, sir.
Q. That was on what day—March 24?
A. March 24, 1920.
Q. When did you first visit room 1320 in the Farmers Bank Building, in Pittsburgh?
A. I think it was on April the 4th—the 3rd or 4th.
Q. Did you devote more than one day to the examination of papers on your first visit to the Farmers Bank Building?
A. No.
Q. Just one day, and that was March the 24th?
A. March the 24th.
Q. And you didn't visit the premises again until when?
A. I think it was April the 3rd.
Q. In the meantime, had you been in conference with Mr. Imbrie, or any other representative of Mr. McDowell's?
A. No.
Q. Had no personal interview with any of his representatives?
A. No.
Q. On your second visit, I wish you would state what you did.
A. On my second visit to Pittsburgh, which I think was on April the 3rd, I came there with Mr. Paul R. Jones. He and I went to the office of the Quapaw Gas Company, room 1320, and
64 went through again some of the files in that office. We did not remove any papers from that office at that time, as near as I can recollect. We were there on the 3rd and 4th, and I believe the 5th. On April the 6th we had an arrangement to meet McGovern, following an attempt to get Mr. McDowell or his representatives to open the small safe, at which time we wished him to be present and claim such papers as were his. Meeting in front of that office on April the 6th Maj. C. C. McGovern, he told us that the safe had been opened by Miss Melus, in the presence of Mr. McDowell's representative, and that papers had been abstracted therefrom. And that he had been more or less threatened, and given various reasons why he should allow them to have access to that safe, notwithstanding he had been hired to see that no person entered the office of the Quapaw Gas Company. Thereupon Mr. Jones and I went into the Quapaw Gas Company's office and forced open the desk in the office and examined and took away some papers. And examined and took away other papers from the files, but did not examine the small safe, which was then locked.
Q. Was that your last visit to room 1320 in the Farmers Bank Building?
A. Yes, sir.

Q. You haven't been in there since?

A. No.

Q. When you came to Pittsburgh on March 23rd did you confer with any Federal official with regard to your visit to that
65 office?

A. No.

Q. Were you accompanied on April the 3rd by any Federal officer when you went to those premises?

A. No.

Q. Had you been deputized to go to those premises by any further authority?

A. No, sir.

Q. Were you accompanied by any post-office inspector?

A. No.

Q. By any United States marshal or his deputy?

A. No.

Q. Any representative of the Department of Justice?

A. No.

Q. On either occasion?

A. No, sir.

Q. Have you made any report to any department of the Government concerning any matters about which you were investigating at that time?

A. No, sir.

Q. And what you are testifying is true of your visit in April as well as in March?

A. To the best of my recollection and belief.

Q. Before your first examination of the premises in the Farmers Bank Building, had you seen Mr. Imbrie?

A. No. Except on the day of the examination and prior to
66 the time we went into the files.

Q. Where was Mr. Imbrie at that time?

A. He was in the office of J. C. McDowell, room 1321.

Q. And what did you say to Mr. Imbrie on that occasion?

A. On that occasion Mr. C. B. Scully, a member of the Pittsburgh bar, accompanied me, and I think he presented to Mr. Imbrie the request that I, as the representative of the Quapaw Gas Company, be allowed to take possession of the office of the Quapaw Gas Company and remove therefrom certain papers.

Q. When you came to Pittsburgh did you have a letter from an officer of the Quapaw Gas Company with you?

A. Yes.

Q. Will you look at this; is that the paper or letter you brought with you?

A. Yes.

Q. Whose signature is that?

A. The letter bears the signature of Frank W. Frueauff.

Q. Was he an officer of the Quapaw Gas Company at that time?

A. He was president of the Quapaw Gas Company.

Mr. BURDEAU. We offer this letter in evidence.

Mr. MARSHALL. There is a copy of that letter attached to the

Mr. BURDEAU:

Q. Was Mr. McDowell an officer of the Quapaw Gas Company?

67 A. Yes.

Q. What office did he hold in that company?

A. He was vice president of the Quapaw Gas Company.

Q. Was he employed by Henry L. Doherty & Company?

A. Yes.

Q. Was he an officer in the Cities Service Company?

A. He was a director.

Q. When you spoke to Mr. Imbrie on March 24, what room were you in, 1320 or 1321?

A. I was in room 1321.

Q. That was the room claimed to be Mr. McDowell's private office?

A. Yes.

Q. When you talked to Mr. Imbrie, did you make any claim at that time that room 1320 was Mr. McDowell's private office?

A. No.

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68 HENRY L. DOHERTY, a witness called by the petitioner, being duly sworn, testified as follows:

Direct examination by Mr. MARSHALL:

Q. You are a member of the firm of Henry L. Doherty & Company?

A. Yes.

Q. A partnership, I believe?

A. Yes.

Q. You are also connected with the Cities Service Company?

A. I am a director and the president of the Cities Service Company.

Q. Was this investigation that was started here in March by Mr. Winans at your instance?

A. Well, the investigation as a whole was at my instance; that is, the investigation as a whole was deliberated over and we decided to go ahead with it. The detail moves, I don't know that I had anything to do with those detail moves.

Q. Did you delegate Mr. Winans to come on here to Pittsburgh?

A. No; I didn't.

Q. Well, you knew that he was sent here by Mr. Frueauff, your partner.

A. I don't know that I knew it in advance. I knew that our office was to be investigated.

Q. Did you learn afterwards that some papers were brought from that office back to New York?

69 A. I saw certain papers that were found in that office.

Q. Did you make a complaint to the United States Government?

A. Did I personally make complaint?

Q. Yes.

A. No, sir; I did not.

Q. Did you or any officer of your company, to your knowledge, make any complaint about the office of J. C. McDowell to the United States Government?

A. Well, I am trying to see if I understand your question. In the sense that a layman would understand it. Sometimes that is quite different. I can't answer that question. Because I have taken no part in what has been actually been done. I have simply sat into the conferences——

Q. Well, all right. When did you have your conferences?

A. Well, I have conferences on general information—where we worked them in between appointments and matters of that sort.

Q. With whom do you have conferences?

A. With Mr. Frank W. Frueauff and Mr. Charles A. Frueauff.

Q. Which one is your partner?

A. Frank W. Frueauff.

Q. And Charles A. is counsel for Doherty and Company and also counsel for the Cities Service Company?

A. Yes, sir.

Q. In which he is a director?

A. Yes, sir.

70 Q. Well, whenever the complaint was made, it was authorized by you or by your company, to the United States Government with regard to the investigation of Mr. McDowell's affairs.

Objected to by Mr. Patterson.

Objection overruled.

A. I can't answer that. Both Mr. Charles Frueauff and Mr. Frank Frueauff are here.

Q. Well, whenever it was made, was it made with your consent?

A. You have got me there on a kind of a technicality. I don't know whether the Government took this up with us or whether we took it up with the Government. I know that the matter of the Government taking it up was with our full approval.

Mr. BURDEAU. We will admit, your honor, that complaint was made to the Department of Justice.

Mr. MARSHAL. Did your company, the Cities Service Company, of which you are the president, as I understand it, not make a complaint to the Post Office Department of the United States with regard to the alleged fraudulent use of the mails by J. C. McDowell?

Mr. PATTERSON. That is objected to, for the reason that the
71 witness said that he has no personal knowledge of the matter, and the fact that such complaint has been admitted by the Government.

Mr. BURDEAU. I object, on the same grounds.

By the Court. The witness says he doesn't know that personally.

Mr. Marshall. I would like to have the question answered.

By the Court. He may answer it.

A. Why, I know we have been in full accord of having it investigated by the Federal Government, but I don't remember that a specific complaint was made up and sent in by the Cities Service Company. That may have been true, or may be a matter of detail that I didn't make a mental note of.

Q. You can't set the time that you took up this matter in conference with Mr. Frueauff—no knowledge of the date?

A. What matter do you mean?

Q. With regard to the complaint of the Government as to the use of the mail by Mr. McDowell.

Mr. Patterson. That is objected to as unfair to the witness, who has already stated that he doesn't remember.

72 By the Court. I don't think it is unfair. The witness has confused the formality of the complaint and the bringing of the attention of the Government to it.

Question read.

A. No; I don't remember.

Mr. Marshall:

Q. Have no idea?

A. Not definitely enough. I know it was during the progress of this investigation.

Q. Well, what do you mean by this investigation?

A. Well, I mean the investigation as to the knowledge that had come to our eyes that there was widespread corruption connected with our company.

Q. Was that the State investigation or the United States investigation?

A. Well, that was our own investigation. We started out some time ago to try to run down some of the extraordinary things that had come to our attention in connection with our company.

Q. And was that when you sent Mr. Winans to Pittsburgh?

A. The various consequences of this investigation finally led up to send Mr. Winans on to Pittsburgh to see if there was anything in the office of the Quapaw Gas Company at Pittsburgh that would throw any light on these irregularities.

73 Q. Did you approve of taking papers from the office 1320 on to New York?

Objected to by Mr. Patterson.

By the Court. I will permit him to answer the question.

A. Why, certainly, as they were our papers.

Cross-examination by Mr. Burdeau:

Q. When did your firm and the Cities Service Company commence the investigation of alleged corruption on the part of J. C. McDowell in the Cities Service Company and the subsidiary companies?

A. I am afraid I can't answer that question very definitely, but I would say probably more than a year ago we started in to make investigation.

Q. Would you say that the investigation was in progress in February of 1920?

A. Oh, yes.

Q. And that representatives of your firm, the H. L. Doherty and Company and the Cities Service Company, and the various subsidiary companies, be sent to the various offices of the subsidiary companies to investigate the papers of those companies?

A. Yes, sir.

74 Q. And that Mr. Winans was sent to the office of the Dominion Gas Company at Buffalo?

A. I know that the auditing department had been instructed to make up an audit, but I did'nt know that Mr. Winans had made it or what he did on the whole.

Q. But as an officer of the Cities Service Company and as a member of the firm of Doherty and Company, you received certain information with regard to the condition at the Buffalo office, did you not?

A. Yes.

Q. And that information was obtained prior to the time that Mr. Winans came to Pittsburgh on March 23?

A. Oh, yes.

Q. And did that information have anything to do with J. C. McDowell?

A. Yes.

Q. Did you learn that a man named Lowry had accused Mr. J. C. McDowell of irregularities?

Objected to by counsel for petitioners as not cross-examination.

Question withdrawn.

Q. Had the name of J. C. McDowell been brought to your attention in connection with alleged frauds prior to March, 1920?

A. Yes.

75 Q. And you knew that your firm, Henry L. Doherty and Company, the Cities Service Company, and certain subsidiaries were, through their proper officers, investigating J. C. McDowell before that time?

A. Yes, sir.

Q. What was Mr. McDowell's connection with the Cities Service Company?

A. He was a director of that company.

Q. And who paid the salary of J. C. McDowell?

A. Well, I don't know whether Mr. McDowell's salary was paid entirely by the Empire Gas and Fuel Company or by Henry L. Doherty and Company, but I suppose it was paid partly by each.

Q. Did you personally ever make any report to any Federal officer regarding J. C. McDowell?

A. I did not.

Q. You knew, of course, that it was contemplated?

A. I knew that there had been conferences between the Federal officers and our representatives.

Q. You did not, prior to March 20 or 23rd, have any conference with any Federal officer, did you?

A. No, sir.

Q. You personally never had any conference with any Federal officer?

A. I never have.

76 Q. Do you have any personal recollection as to when any conferences were had prior to April 6th, with reference to presenting a complaint to the Federal Government?

A. I can't recall.

Q. You have delegated the matter of making that complaint to the Federal Government to other officials of your company?

A. That is right.

Q. You have simply approved of their action after you have discussed it, have you?

A. I remember that we had a long discussion when we realized what was going on in our organizations, and I said that as a matter of good citizenship we ought to have the widest possible investigation; but I haven't charged my memory with the dates.

Mr. MARSHALL:

Q. Wasn't the reason that you complained to the Government to get out of paying Mr. McDowell $2,000,000 that you owed him? Objected to, as irrelevant and immaterial.

By the COURT. Yes, that is objectionable.

Mr. MARSHALL:

Q. Did you ever talk to Mr. Atwood, of Kansas?

A. Yes.

Q. When did you talk to him?

77 A. Why he came to see me about certain claims that a client of his had and certain difficulties that this client had had with Mr. McDowell.

Q. When was that?

A. I would think about six weeks ago. I can't be very accurate about dates; I don't attempt to charge my mind with them.

Q. That was the first time, was it?

A. I would say it was about six weeks ago.

Q. If any private papers of Mr. McDowell were taken from 1320 Farmers Bank Building, you would approve of that?

Objected to by counsel for Government as a hypothetical question not based upon any evidence.

Mr. PATTERSON. Nor are the papers described in any way.

Objection overruled.

A. If I were to see any papers so I could judge whether they are private or not, I will be glad to answer. But I can't answer it otherwise.

Q. But all of the papers that were in 1320, including a large number of private papers of Mr. McDowell's, were taken with your approval?

A. If they were strictly private papers and have nothing to do with out interests I might not.

Q. Do you know that all of the papers, including private papers of Mr. McDowell, were taken from room 1320 to your office
78 in New York?

A. I don't know what was done. But I know the men who did it. I know they wouldn't do anything irregular.

Q. Do you know Sheridan, an employe of the private detective agency?

A. No; I do not.

Q. Don't you know that he brought them down there?

A. No, sir; I don't.

Q. Did you ever examine the papers that were brought there to see whether the private papers of Mr. McDowell had been taken to your office?

A. No; I didn't.

Q. Do you know Sheridan at all?

A. No; I don't.

Q. Do you know who he is?

A. No; I don't.

FRANK W. FRUEAUFF, a witness called by the petitioners, being duly sworn, testified as follows:

Direct examination by Mr. MARSHALL:

Q. You are a member of the firm of Henry L. Doherty and Company?

A. Yes.

Q. One of the partners, I believe?

79 A. Yes, sir.

Q. You and the last witness are still partners, are you?

A. Yes, sir.

Q. And are you connected with the Cities Service Company?

A. I am.

Q. What position do you hold there?

A. Vice president and a director.

Q. Did the Cities Service Company or the H. L. Doherty Company make any complaint to the United States Government with regard to the use of the mails by J. C. McDowell?

A. Yes, sir.

Q. Did you make it in writing?

A. No; I made it personally.

Q. To whom?

A. I first went to Attorney General Palmer.

Q. A. Mitchell Palmer, Esq.?

A. Yes, sir.

Q. Where?
A. At Washington.
Q. When?
A. In the early part of June this year.
Q. You made your complaint at that time?
A. Yes.
Q. Well, did the department take it up at that time?
A. He referred me to one of his assistants.
Q. To whom?
80 A. I have been trying to recall his name. I can't rememb
his name. He is a brother-in-law to President Taft.
Mr. BURDEAU. Mr. Herron?
A. Yes; that's the name.

Mr. MARSHALL:

Q. When did you see Mr. Herron?
A. That same day that I saw Mr. Palmer.
Q. Did they take it up directly?
A. They told us to give them a statement in writing of what t
facts were.
Q. Did your firm on the 15th day of July abstract, or have a
stracted, from room 1320, Farmers Bank Building, all of the pape
contained therein?
A. I did not.
Q. Was Mr. Worley representing you at that time when he h
possession of room 1320, Farmers Bank Building?
A. Mr. Worley?
Q. Yes.
A. I don't know who Mr. Worley is.
Q. Well, who was your representative in Pittsburgh acting in th
matter in July, 1920?
A. Well, I don't know how to answer that. Our auditing d
partment was following up this matter and Mr. Scully was o
81 counsel here in Pittsburgh.
Q. He was your attorney, but who was your representati
who had you employed?
A. I don't know who was employed. Mr. Jones and Mr. Wina
had been here from time to time, but who they employed I did
know.
Q. Well, wouldn't that employee be acting under the directio
of the two companies, the Cities Service Company and H.
Doherty Company?
A. I presume so.
Q. Now, after you had learned from Mr. Herron that he want
a written statement, who prepared that written statement?
A. Mr. Arnburg, I think.
Q. Who was he?
A. He was an attorney.
Q. From where?

A. From Mobile, Alabama.
Q. He is here in court, is he?
A. Yes, sir.
Q. And did you get him to come up to New York to prepare it?
A. No, he was in New York.
Q. And when did he prepare it?
A. Well, within a week from the time we had met Mr. Herron.
Q. Well, you did this back in June, you say?
A. Yes, sir.
Q. Well, when did he prepare this statement?
82 A. Well, in June.
Q. Well, when?
A. Well, some time after the middle of June.
Q. Can't you tell by your records?
A. I don't know that we would have a record of that.
Q. Well, you keep a record of what you do?
A. Yes.

Mr. PATTERSON. We object to counsel cross-examining his own witness.

By the COURT. I will give you considerable latitude, Mr. Marshall, but I suggest to you that you do not require a ruling of the court on it.

Mr. MARSHALL:

Q. Don't you have any way of determining when that written statement was submitted to the Government?
A. Well, there must be some record in our office of it. I don't have it in mind.
Q. Well, to whom was it submitted?
A. Well, I read it over after it was prepared. To whom it was submitted, I don't know.
Q. To whom was it addressed?
A. I don't remember that. I think it was to the Attorney General.
83 Q. Well, do you remember whether it was in June that it was submitted?
A. Well, it took some little time to prepare it. Whether it was in June or not——
Q. Well, you are still evading the question.
A. Well, I think it was later than that.
Q. Well, when do you think it was?
A. I think it was in August.
Q. And you don't know that when that written complaint was submitted, that you wanted to have Mr. Burdeau appointed and that there was objection came from Pittsburgh to having Mr. Burdeau appointed, because he had been appointed in one of your other cases?
A. I never heard of that until this moment.

Q. And don't you know that after the District Attorney here in Pittsburgh objected to Mr. Burdeau being appointed, you waited until the district attorney got out of office and then you had Mr. Burdeau appointed?

Objected to.

By the COURT. The witness has already answered.

Mr. MARSHALL:

Q. Wasn't the complaint made in writing in June?

Mr. BURDEAU. We have admitted that the complaint in writing was made on June the 11th.

84 At this point the witness was withdrawn, for the purpose of hearing a witness on behalf of the Government, who could not remain.

ARTHUR E. BAUN, a witness called out of order on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. BURDEAU:

Q. What is your business?

A. President of the Farmers Deposit National Bank.

Q. Will you look at this instrument which I show you and state whether or not the signature there is your signature?

A. It is.

Q. Is that a lease between the Farmers Bank and the Quapaw Gas Company from December, 1919?

A. It is a lease dated December, 1919, from the 1st of April 1920 to April 30, 1920.

Q. It was an extension of a preexisting lease?

A. I think so.

The lease identified by the witness offered in evidence by counsel for Government.

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85 The witness Frueauff resumes the stand.

Cross-examination by Mr. BURDEAU:

Q. Prior to the time that you saw the Attorney General, had you discussed Mr. McDowell with any Federal officer?

A. No, sir.

Q. Had any of your companies and your firm been investigating Mr. McDowell?

A. Yes, sir.

Q. And how long had you been investigating him—I mean by you, your firm, and your companies?

A. Well, it was some considerable time before that that we had been making the investigations—running back into the previous year.

Q. You had knowledge of the fact that Mr. Winans had come to Pittsburgh on March the 23d?

A. Yes.

Q. At that time had you or any one connected with H. L. Doherty Company made any complaint or report to the Department of Justice?

A. No, sir.

Q. Or to the Post Office Department?

A. No, sir.

Q. Or to any other Federal department?

A. No, sir.

86 Q. Or had any other representative of the companies affiliated with the Cities Service Company made such complaint?

A. No, sir.

Q. And were you in personal charge of those investigations?

A. Yes, sir.

Q. And your various superintendents reported to you directly, did they?

A. Yes, sir.

Q. And from those various sources you had knowledge of what was being done in those investigations?

A. Yes, sir.

Q. Was that true with respect to the visit paid by Mr. Winans about April 6, 1920?

A. Yes.

Q. Then there had been no complaint made by you or any of your representatives to the Post Office authorities up to that time?

A. No, sir.

Q. I understand you to say that you didn't see the Attorney General until some time in the early part of June?

A. Early in June.

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87 BEATRICE G. MELUS, a witness called on behalf of petitioner, being duly sworn, testified as follows:

Direct examination by Mr. MARSHALL.

Q. I believe you are the private secretary of J. C. McDowell?

A. Yes, sir.

Q. For what length of time have you been employed by him?

A. I have been with Mr. McDowell since June, 1913.

Q. What offices did Mr. McDowell have?

A. 1320 and 1321 Farmers' Bank Building.

Q. Did the Quapaw Gas Company have any offices in the Farmers' Bank Building at that time?

A. Yes; they had. They had some offices on the 10th floor.

Q. Did their name appear on any lease connected with either 1320 or 1321?

A. Yes; we leased the office 1321 for a private office for Mr. McDowell. But there was no name on the door or anything connected with 1320 Farmers' Bank Building.

Mr. BURDEAU. I move that the statement of the witness, with regard to leasing the premises for J. C. McDowell be stricken out.

By the COURT. Well, if she follows it up by showing her knowledge of the fact.

88 Mr. MARSHALL.

Q. How long did the Quapaw Gas Company have offices on the 10th floor, up until what date, about?

A. They had the treasury department on the 10th floor of the Farmer's Bank Building, and I think it was in 1914 or probably early in 1915, that the treasury department was moved to Bartlesville, Oklahoma.

Q. Up until that time did the Quapaw Gas Company ever use room 1320?

A. It was used several times for directors' meetings; that's all.

Q. After they moved their treasury department to Oklahoma in the latter part of 1914, or the early part of 1915, was room 1320 ever used by the Quapaw Gas Company?

A. It was not.

Q. Whose furniture was the furniture that was contained in room 1320, in the year 1920—from March during all the year 1920?

A. Mr. McDowell's.

Q. Do you know that, personally?

A. Absolutely.

Q. In whose name was the telephone?

A. Mr. McDowell's.

Q. Do you know where Mr. McDowell secured the furniture that was contained in room 1320?

A. Yes; I do. Mr. McDowell had moved to the Farmer's
89 Bank Building from 1102 Keystone Bank Building, and all the furniture that was in 1320 was brought from 1102 Keystone Bank Building to room 1320 Farmer's Bank Building.

Q. Was there any additional furniture purchased after that furniture was brought from the Keystone Bank Building?

A. Yes; there was.

Q. Who purchased that?

A. I did.

Q. Mr. McDowell?

A. Personally.

Q. There were some filing cases, I believe, in 1320?

A. Yes; 1320 was a very large office and there was a lot of furniture in it.

Q. What was in there?

A. Do you mean everything that was in the room?

Q. Yes; everything of importance.

A. There was a very large desk, Mr. McDowell's private desk, a large table, a very large safe which belonged to the Farmer's Bank Building, and a small safe which belonged to Mr. McDowell, personally, a large map file, and a sixteen-drawer filing case—that is, 16 units; and a couch and two large desk chairs, and, I think, there

were six or eight smaller chairs, and about eight or nine transfer cases—the large drawers that are used for transferring files.

Q. Which room did Mr. McDowell use as his private office?

90 A. 1320 always.

Q. When you entered 1320, what did you go in through?

A. He always came in through 1321 and the door into the hall from 1320 was always locked; and the entrance into the office was 1321; and 1320 was a private office.

Q. In March, 1920, did any person come to these two offices, 1320 and 1321, and exercise any control over those offices?

A. Yes, sir.

Q. Who?

A. On March 23rd Mr. Scully came to our office in the afternoon, I think it was about 4 o'clock, accompanied by the superintendent of the Farmers Bank Building and a detective whom Mr. Scully brought.

Q. That was on March the 23rd?

A. That was in the afternoon of March the 23rd.

Q. What was done then?

A. Well, Mr. Scully asked me if I knew the superintendent of the Farmers Bank Building and asked the superintendent if he knew me. Then he put this detective in charge of room 1320. He first told me that there would be a young man in 1320 and I thought it was a young man probably sent to do some extra work, and I asked him when he would start in, and he said, "To-night." Then he sent the young man into room 1320 and later told me he was a detective.

Q. Did he afterwards tell you that you couldn't enter that room?

91 A. No, sir. The young man was put in there and the door was locked.

Q. When was that?

A. March the 23rd.

Q. Did you have any talk with Mr. Scully with regard to the matter after that?

A. No, sir; I had not.

Q. Which door do you mean was locked?

A. The door between 1320 and 1321.

Q. When did you have any further talk with Mr. Scully? You say the detective was put in charge of 1320 on the night of the 23rd?

A. Yes.

Q. Then what?

A. On the evening of the 23rd, I didn't know what was wrong, and the proceeding was so unusual——

Mr. BURDEAU. I object to that and ask that it be stricken out.

By the COURT. It was unusual. I would use the word unusual myself. Proceed.

A. I called Mr. Imbrie from my house and told him that there was something wrong and asked him if he would come to our office the next morning, that I had understood from Mr. Scully that
92 there would be some one there from the New York office on the morning of the 24th, and I wanted some one to be there to protect Mr. McDowell's interests, and Mr. Imbrie came.

Q. What took place there?

A. Mr. Imbrie was there when they arrived; and Mr. Scully and Mr. Imbrie had a little talk and it was agreed between Mr. Scully and Mr. Imbrie that I should select all the papers pertaining to Henry L. Doherty & Company and the Cities Service Company or any subsidiary company. And Mr. Winans and I were to do this together; and in the event that we disagreed on any of the papers, Mr. Scully and Mr. Imbrie were to decide as to whether they belonged to the companies or to Mr. McDowell personally.

Q. That was on the 24th?

A. That was on the morning of the 24, about 9.30.

Q. Go on and tell us what took place that day.

A. Well, Mr. Scully and Mr. Imbrie left the office with that understanding. Mr. Winans only entered room 1320 Farmers Bank Building, but the files in 1920 were so full that I had a few of the files belonging to the company in 1321, and I immediately offered to give Mr. Winans the files belonging to the company in that room. And Mr. Winans and I started on the files together; but Mr. Winans immediately exceeded his authority and insisted on taking out Mr. McDowell's personal papers.

93 Counsel for the Government object to the statement of the witness as to Mr. Winans exceeding his authority.

By the COURT. Yes; the words that Mr. Winans exceeded his authority should be eliminated.

Mr. MARSHALL. Then what occurred?

A. Mr. Winans insisted on taking the private papers of Mr. McDowell.

Q. That is, in what room?

A. In 1321. Then Mr. Winans went into 1320 and locked me out.

Q. Did you at any time during that time open the large safe in 1320?

A. Yes, I did.

Q. Did or did not Mr. Winans take any papers from the large safe on the 24th day of March?

A. No, he didn't, because there were none there pertaining to the company. Everything in that safe, as Mr. Winans saw by the files as they were packed up, belonged to Mr. McDowell personally; and to my knowledge there were no papers taken out of the large safe on March 24th.

Mr. BURDEAU. That is objected to as a conclusion of the witness.

Mr. MARSHALL:

Q. Well, you were there with him, weren't you?

94 A. Absolutely; until 6 o'clock that night.

Q. When did you have the large safe in 1320 opened for Mr. Winans inspection?

A. On March 23rd, 1920.

Q. The 23rd or 24th?

A. March 24th, 1920.

Q. You didn't see him, I believe, on March the 23rd?

A. No; he arrived on March the 24th in the morning.

Q. After that safe was opened, did he or did he not inspect all of the papers in that safe?

A. I can't say that he inspected every one, but he inspected the majority of them.

Q. And what, if anything, did he say as to being satisfied that there were no papers except those of Mr. McDowell's?

A. I asked him when I left the office in the evening if he wanted to have anything further done with the large safe, and he said no.

Q. And then what did you do?

A. I locked it.

Q. That was on the evening of the 24th?

A. Yes; on the evening of March the 24th.

Q. Had any papers been taken from that safe at that time?

A. Yes, sir.

Q. Had you or not opened the roll-top desk for Mr. Winans to investigate?

A. Yes, I did.

95 Q. When?

A. I don't believe we got to the desk until some time in the afternoon of March the 24th.

Q. Did you allow him to inspect the papers in there?

A. Yes; he went through everything.

Q. Did he find anything belonging to the companies in that desk?

A. He took quite a few papers from Mr. McDowell's desk that he said belonged to the company, but I couldn't see that they did.

Q. But the balance of the papers were what—were they or not the private papers of Mr. McDowell?

A. Yes, they were.

Q. Then as to the files in 1320, what were in those files?

A. May I state in detail?

Q. I forgot to ask you—did you close the roll-top desk?

A. I did, and locked it and took the key.

Q. Then, as I understand you, you had opened and closed the large safe?

A. Yes, sir.

Q. And you had opened and closed the roll-top desk?

A. Yes, sir.

Q. And you had taken the papers that belonged to any of the companies, all the papers that were not the private papers of Mr. McDowell, from 1321 into 1320?

A. Yes, sir.

96 Q. Then the only things that were left were the files?

A. Yes, sir. And everything that pertained to any of the companies were taken out of those large files and piled in room 1320.

Q. And when did that take place?

A. That took place later during the day of March 24, 1920.

Q. And when was it that Mr. Winans excluded you from 1320?

A. Well, he first locked me out on the morning of March 24th.

Q. But he afterwards left you in again?

A. Yes. I called Mr. Imbrie to our office, and he finally went home, and I was with Mr. Winans until 6 o'clock that night.

Q. And you locked the big safe before you left that night?

A. Yes, sir.

Q. Were you ever in that room after March the 24th in the afternoon?

A. Yes; I was.

Q. I mean with Mr. Winans or with the detectives?

A. No, sir; I wasn't.

Q. I wish you would state whether or not you were in room 1321 daily from March 24th up to April the 6th.

A. I was.

Q. Including Sundays?

A. No, sir; but all other days.

Q. I wish you would state whether, during all that time there was a detective in charge of room 1320.

97 A. There was all the time.

Q. From March the 24th?

A. From March the 24th.

Q. On July 15th, what, if anything, did you see done in the office in the Farmers Bank Building?

A. I know that on the night of July the 15th all of the furniture, Mr. McDowell's furniture and everything in 1321 was taken out of the office on the night of July the 15th, 1920.

Q. That was 1321?

A. That was 1321, the private office of Mr. McDowell, and also 1320.

Q. Had you seen what was in there the day before or within a day or two before?

A. Yes; I had.

Q. How had you seen it?

A. The door was open and I went in and looked at it.

Q. What was in there the day before?

A. Everything that had been there before. Everything was in a pretty dilapidated state, but still the furniture and files and everything were in there then.

Q. What about the papers in the large safe?

A. Well, the large safe, Mr. Marshall, had been bored before that.

Q. Well, when was it bored—do you have the date?

A. The night of the 20th of May, 1920.

98 Q. Do you know what happened to the papers?

A. The papers were put in two large telescopes and taken by Mr. Winans to New York.

Q. How do you know that? Did you see the papers put in the telescopes?

A. No; I didn't.

Q. Well, did you have any talk with Mr. Winans?

A. No; I hadn't.

Q. Well, then how do you know that?

A. Well, I was told that.

Mr. MARSHALL. Then I don't want that it.

By the COURT. Yes; that should be stricken out.

Mr. BURDEAU. We object to it being stricken out.

Mr. MARSHALL:

Q. When was the last time you saw papers taken from the large safe?

A. I never saw the papers in the large safe from the time I locked the safe on March the 24th.

Q. How do you know that this large safe was bored in May—was it from information that you gained from other people?

A. I heard it from the building; the people all over the building heard the safes being bored.

Q. You heard of that?

99 A. Yes, sir.

Q. You didn't see it and you didn't hear the boring take place yourself?

A. No.

Q. Did you see it there after it was bored?

A. Yes; I did.

Q. When did you see it?

A. I saw the safe when it was brought out of the office and stood in the hall for several days.

Q. When was that?

A. That was after July the 15th.

Q. Did you see anything with regard to the boring of the small safe?

A. Yes; that was bored the same night that our safe was bored.

Q. Well, did you see the small safe after it was bored?

A. Yes; I did.

Q. When did you see it?

A. I saw it in the office the same day I saw all of the rest of the furniture.

Q. That was the day before everything was taken out?

A. The day before it was taken out; yes, sir.

Q. Do you know who it was took this stuff out of there?

A. I think it was the Shanahan Storage Company.

Q. Did you see them take it?

A. No; I didn't.

100 Q. Then you don't know that. Did you at any time look in this room, or go into this room between July 15th and March the 24th?

A. No; I didn't.

Q. Didn't you speak about going in with Mr. Imbrie one day?

A. Yes; I went in, in the presence of Mr. Scully, with the permission of Mr. Scully, to get an insurance policy out of the large safe, and Mr. Scully was with me.

Q. When was that?

A. I can't tell you the exact date of that, but I think it was early in April some time.

Q. And you were also in there about April the 6th, with Mr. Imbrie and another gentleman?

A. Yes; I was.

Q. What did you do at that time?

A. Mr. Imbrie asked me if I had the combination of the small safe, and I told him I could get it, and he told me to get it and come in and open the safe, which I did.

Q. Did you open it?

A. I did.

Q. What was taken from it?

A. Well, there was a mass of documents; I don't know in detail what they were, but they were Mr. McDowell's private property and in his private safe.

Q. That's the small safe?

A. The small safe.

101 Q. Who was with Mr. Imbrie at the time?

A. A gentleman from New York.

Q. Do you remember his name?

A. Condon, I believe it was.

Q. Did you ever see any of the stuff removed from that room at any time between the latter part of March and the 15th of July?

A. No; I didn't.

Q. The only thing you know was what you were informed?

A. That's all.

Q. I believe I did ask you to whom the filing cases in room 1320 belonged?

A. Everything belonged to Mr. McDowell and had been paid for by him.

Q. Carpet?

A. Carpet and everything.

Q. You did make an exception about the large safe?

A. Everything with the exception of the large safe, which belonged to the building.

Q. When the detectives quit watching this room, what was left in it?

A. Nothing.

Q. Was the big safe still there?

A. Yes. And it was brought out into the hall because it couldn't be used by the tenant who sublet the office.

102 Cross-examination by Mr. BURDEAU:

Q. There were two offices adjoining, were there not?

A. Yes, sir.

Q. 1320 was the larger office?

A. Yes, sir.

Q. That was the office you say Mr. McDowell occupied as a private office?

A. That was the one.

Q. The door of which leading into the hall was closed and locked?

A. The door from 1320 to the hall was always kept locked.

Q. And you occupied 1321?

A. I did.

Q. There were filing cases in 1321?

A. Yes, a few; because we didn't have room in the other room to place them.

Q. And they contained documents and papers relating to some of the companies in which Mr. McDowell was a director?

A. I suppose there were five or six folders in those files which pertained to a subsidiary company: that was all.

Q. And that was in the room that you occupied, 1321?

A. Yes, sir.

Q. And 1320, the larger room, contained filing cases also?

A. A very great many.

Q. And those filing cases contained a great many papers relating to corporations of which Mr. McDowell was an officer

103 and director?

A. I don't quite understand.

Q. Those filing cases in the larger room, 1320, contained a large number of papers, documents, reports, and so on, relating to corporations of which Mr. McDowell was an officer?

A. Not very many; a very few.

Q. Isn't it a fact that he had correspondence in there relating to the Cities Service Company?

A. It is not.

Q. Isn't it a fact that he had correspondence in there relating to the Empire Gas and Fuel Company?

A. Yes.

Q. Isn't it a fact that he had correspondence there relating to the Quapaw Gas Company?

A. Not since 1913.

Q. Do you mean to say there was no correspondence in the large room pertaining to the Quapaw Gas Company?

A. I don't believe there was any correspondence there since they removed the treasury to Oklahoma.

Paper shown witness.

Q. Will you look at that paper and see if that is your signature?

A. That is Mr. McDowell's signature in my handwriting.

Q. He dictated that letter?

A. No. I dictated the letter myself.

104 Q. Did you put the initials "J. C. McD." on that letter?

A. I very often did that.

Q. Whether you dictated letters or not, did you put the letters "J. C. McD." on there without his dictating it?

A. Well, they may be his initials.

Q. Will you deny that Mr. McDowell dictated that letter?

A. No; I wouldn't say that he did or didn't.

Q. You signed it as his agent?

A. Yes.

Paper produced was a letter purporting to be from Mr. McDowell, dated January 6, 1919.

Paper produced and marked as U. S. Exhibit "A."

Q. Will you look at this instrument, Government Exhibit "A," for identification—look at this lease?

A. Yes, that is the lease of the Quapaw Gas Company.

Q. That was the lease that was sent with this letter, wasn't it?

A. Yes, sir.

U. S. Exhibit "A" offered in evidence.

Q. That was business of the Quapaw Gas Company?

A. That was the lease of the Quapaw Gas Company for 1320.

Q. Didn't you consider that the business of the Quapaw Gas Company?

A. No, sir.

105 Q. Making a lease for real estate you don't consider the business of the Quapaw Gas Company?

A. It was always understood that the Quapaw Gas Company rented that office from Mr. McDowell.

Q. Don't you consider that the making of a lease for which there was to be payment of money was business of the Quapaw Gas Company?

Objected to by counsel for petitioner, as not cross-examination.

Mr. BURDEAU. I have a right to see if this witness is biased.

By the COURT. She hadn't said that there wasn't any business of the corporation done there. She qualified her statement with respect to the business of the Quapaw Gas Company by adding there was a little, or something of that kind. She didn't say there wasn't any at all.

Mr. BURDEAU. Well, I am proving that there was.

By the COURT. Well, she has admitted it.

Mr. BURDEAU. Your honor sustains the objection.

By the COURT. Well, I will permit it to be answered.

106 Question read, as follows:

Q. Don't you consider that the making of a lease for which there was to be payment of money was business of the Quapaw Gas Company?

A. It was looked upon purely as a matter of form, so far as I ever thought of it.

Q. Didn't the Quapaw Gas Company pay the rents with their own checks?

A. Yes; they used to go through our office always.

Q. And they were sent from the home office of the Quapaw Gas Company?

A. For the last few years.

Q. Who paid your salary.

A. I don't know that it was ever paid by the Quapaw Gas Company.

Q. Wasn't it paid in part by the Quapaw Gas Company?

A. I have nothing to show that it ever was.

Q. How did you receive your salary?

A. I received part of my salary from Bartlesville, Oklahoma. But there was never any indication that it was paid by the Quapaw Gas Company.

Q. How did it come to you?

A. It came in an envelope.

Q. How was it signed?

A. It was signed R. C. Russum or J. P. Chalmers.

Q. Wasn't there a corporation letterhead on the check?

107 A. No, sir.

Q. Did those gentlemen send you their personal checks?

A. It was on the Bartlesville National Bank in their name.

Q. Did you ever write to the Quapaw Gas Company and ask for an increase in salary from $60 to $80?

A. I did not.

Q. You state that under oath?

A. I do.

Q. You don't care to make a change in your testimony?

A. I do not.

Q. Did you ask anybody to do that?

A. Yes; Mr. McDowell.

Q. Did you ever put it in writing?

A. I don't know that I ever did. I know that I talked to Mr. McDowell.

Q. Will you state under oath that it was not the Quapaw Gas Company?

Mr. MARSHALL. I object to the form of the question.

This lady took the oath.

By the COURT. Well, put the question.

Mr. BURDEAU:

Q. Will you state that it was not the Quapaw Gas Company?

A. I never understood that it was the Quapaw Gas Company.

Q. Will you state positively that it was not the Quapaw Gas Company?

108 A. So far as I know it was not.

Q. Just how many private papers belonged to Mr. McDowell—can you describe any of those papers?

A. I couldn't describe the papers that had accumulated from almo the time that Mr. McDowell started in business.

Q. From what is that statement made—upon what facts withi your own knowledge do you base the statement that those papers we the private papers of Mr. McDowell?

A. Because I saw them. I know what was in there pertaining t Mr. McDowell's private business and other affairs outside of tho connected with the Cities Service Company and H. L. Doherty Company.

Q. What was such private business?

A. They were very numerous.

Q. Can you name one of them from memory?

A. Yes, I can. I have quite a list here which I have prepare from memory, which I will be very glad to read, if I may.

Q. And you say papers relating to them were taken?

A. Absolutely.

Q. Did you see those papers taken?

A. Well, the files were empty.

Q. Have you any personal knowledge of what became of tho papers?

A. Not personally.

Q. Did you see Mr. Winans take any such papers?

A. No, I didn't see them taken, but I know they were take

109 Q. But you don't know who took them?

A. No.

Q. Where were those papers kept?

A. In room 1320 in the large safe.

Q. None of such papers in room 1321?

A. No, sir.

Q. This large safe that you speak of, what kind of a safe wa that?

A. I suppose it was a safe six or seven feet high.

Q. Wasn't it built into the building?

A. No; it was a removable safe.

Q. And this interview with Mr. Winans was on what day i March?

A. March 24, 1920.

Q. And you went that day into room 1320?

A. Yes, sir.

Q. And you opened the safe on that day?

A. Yes, sir.

Q. And you allowed him to search that safe?

A. Yes, sir.

Q. Did you have any conversation with him about that saf

A. Mr. Winans said he didn't want to do anything further wi it when I left about 6 o'clock.

Q. He stayed there?

A. Yes, sir.

Q. And the safe was open when you left the office?

A. No, sir; it was not.

110 Q. When was it closed?

A. Before I left the office.

Q. Who closed it?

A. I closed it.

Q. You are positive of that?

A. I am very positive.

Q. When did you see room 1320 again?

A. When I went in with Mr. Scully to get an insurance paper.

Q. When was that?

A. I can't give you the date of that, but I think it was early in April.

Q. Was the safe open then?

A. No; the safe was closed and locked. And Mr. Scully permitted me to open the safe and stayed while I did so.

Q. Which safe was that?

A. The large safe.

Q. And did you leave it open on that occasion?

A. I locked it.

Q. On the 6th of April had Mr. Winans taken anything from that safe?

A. No.

Q. He hadn't taken anything from that safe?

A. Not that I saw.

Q. It was in the same condition on the 6th of April that it had been in on March the 24th?

A. Well, I wouldn't say that, because I wasn't permitted to

111 get anything but this one paper.

Q. You went in it?

A. Yes, sir.

Q. And there were papers in it on April the 6th?

A. Yes.

Q. And you believe the same papers were there that were there on March the 24th?

A. Yes, sir.

Q. You are positive that you closed it on March the 24th?

A. I am positive.

Q. Were there any marks indicating any tampering with the safe?

A. Not that I saw.

Q. There were no marks of tampering with the safe on April 6th?

A. Not that I could notice.

Q. And you now insist that all of the papers were in there on April the 6th?

A. I don't know that.

Q. When did you next see the large safe?

A. On July the 15th, when it was rolled into the hallway by the workmen.

Q. Had you been in room 1321 at all between April the 6th and July the 15th?

A. Only with Mr. Scully on that one occasion.

Q. I thought you said it was on April the 6th you went in with Mr. Scully.

112 Mr. MARSHALL. No, sir. Sometime in April she went into the office with Mr. Scully to get the insurance policy.

Mr. BURDEAU:

Q. You can't fix that date?

A. No.

Q. Well, was it before or after April the 6th?

A. I think it was before, but I am not positive about that.

Q. So that you saw the large safe three times, once on March the 24th, once on April the 6th, and once on a date between March 24th and April 6th—is that correct?

A. I saw it on March the 24th, and I saw it when I was in with Mr. Scully to get the insurance policy.

Q. And that was between March 24th and April the 6th?

A. Yes, sir.

Q. And you never saw the safe again until you saw it in the hall?

A. Yes.

Q. That is your statement that you don't care to correct?

A. No.

Q. You were not in room 1320 at all after April 6th, 1920, were you?

A. I couldn't get in. They had detectives there day and night.

Q. The fact is, you were not in there?

A. I was not.

Q. You don't know what happened to the safe after April 6th?

113 A. Not from personal knowledge.

Q. Well, that's all I am asking you for. You don't know what happened in there after April the 6th, 1920?

A. No.

Q. You don't know who was in that room after April 6th, 1920, do you?

A. I know that representatives of the Quapaw Gas Company were in there.

Q. What representatives of the Quapaw Gas Company?

A. The detective agency.

Q. Did you ever see Mr. Winans in there?

A. I saw Mr. Winans in the hall and I saw Mr. Jones in the hall and I saw Mr. Scully there.

A recess was here taken until 1.30 p. m.

AFTERNOON SESSION.

Court reconvened at 1.30 p. m.
Miss BEATRICE G. MELUS on stand.

Cross-examination continued by Mr. BURDEAU:

Q. Did I understand from your testimony in direct examination that Mr. Winans saw you first in the smaller of the two offices, room 1321?

114

A. Yes; that was the only way Mr. Winans could get in.
Q. And at his request did you transfer certain files to room 1320?
A. Very few; three or four.
Q. And those were files that you picked out and gave to Mr. Winans as relating to company business?
A. Mr. Winans and I both picked them out from these several folders that were in the files.
Q. But the files that were taken from the small office were taken into the large office with your acquiescence?
A. Yes.
Q. Did Mr. Winans ever come to room 1321 again and take any papers therefrom?
A. Not that I know of.
Q. You have no knowledge that he did.
A. No.
Q. And the door between room 1321 and 1320 was closed and locked after that visit, was it?
A. Yes, sir.
Q. Did Mr. Winans tell you that he was acting under any authority in coming there?
A. He had a letter from Mr. Frueauff which was given in evidence.
Q. He didn't tell you that he was acting for the United States Government in any way?

115

A. No, sir.
Q. Was there any search warrant of any kind from any governmental authority exhibited to you?
A. No, sir.
Q. Did any one at any time ever claim to you that he wanted papers because of his governmental position or authority?
A. No, sir.
Q. Nobody at any time claimed to represent the United States Government in connection with the taking of these papers?
A. No; they did not.

Mr. MARSHALL:

Q. Has anything been taken from your files later?
A. There has been; yes.
Q. From what room?
A. 1321.

Mr. PATTERSON:

Q. By whom?

A. I don't know.

Mr. PATTERSON. Then this is objected to as not covering an charge in this proceeding.

By the COURT. There is no charge, as I understand it, tha
116 the United States Government through its officials took thes papers, or that any individual representing the Governmen did. I don't understand that there is any charge of that kind.

Mr. PATTERSON. The lady says there were some papers taken fro 1321 some time later, but she doesn't know by whom. I object t that and ask that it be stricken from the record. It doesn't affect an of the respondents in this case.

By the COURT. I don't know. It may be preliminary to something If it is not connected up, it will not be of any value.

Mr. MARSHALL:

Q. When were those taken?

A. About a month ago.

Q. And from what files?

A. From the files in room 1321.

Q. And what papers were they?

A. I can't state exactly what papers were taken, but the files wer ransacked and very much disturbed.

Q. And were there papers missing?

A. I don't know of any papers that are missing, because probabl I haven't gotten around to where I need certain papers. But I d know that the files were very much ransacked and torn up.

117 Q. Did you ever see Mr. McDowell's roll-top desk at an time after 1320 had been in the hands of these officers?

A. Yes; I saw the desk in 1320 when I was in the office to get th paper when Mr. Scully was present.

Mr. PATTERSON. The expression "these officers" is objected to. don't want it to appear that they were Federal officers.

Mr. MARSHALL. I mean the detectives.

By the COURT. I don't think the petitioner claims that the Fe eral officers went in there. They may, but it is not in the reco as yet.

Mr. MARSHALL:

Q. Well, had the desk been broken open at that time?

A. I don't know whether it had been at that time or not.

Q. Did you ever see it again after that?

A. Yes; I saw it just before it was taken to storage.

Q. Oh, it was taken out of that room and put in storage?

A. On July the 15th.

Q. Was that by or with the consent of Mr. McDowell?

A. Absolutely no.

Mr. BURDEAU. That is objected to, as stating a conclusion of the witness.

118 By the COURT. If she was in charge there, she would be able to testify to that.

Mr. BURDEAU. But there is nothing to show that Mr. McDowell may not have agreed to it without her presence.

By the COURT. Well, was she in charge there?

Mr. MARSHALL:

Q. Were you in charge of that office?

A. Yes; I was.

Q. Do you know whether Mr. McDowell was in town when that office was taken over?

A. He was not in town any time when the office was taken over on March the 24th, or when the furniture and everything was taken out on July the 15th.

Q. You are the stenographer and private secretary of Mr. McDowell?

A. Yes, sir.

Q. What was the condition of that desk when it was taken out on July the 15th?

A. The lock had been jimmied; it had been raised up evidently with some strong instrument, and there was a piece of the corner of the desk broken off.

119 Mr. BURDEAU. That is objected to. She didn't see it done. She can merely describe the appearance of the desk.

By the COURT. Well, let her describe the appearance.

Mr. MARSHALL:

Q. What marks, if any, were on the desk, that led you to believe the desk had been broken open?

A. Well, the front of the desk where the lock was was very much battered up and the lock didn't work at all.

A. J. WORLEY, a witness called on behalf of petitioner, being duly sworn, testified as follows:

Direct examination by Mr. MARSHALL:

Q. You conduct a detective agency in the city of Pittsburgh?

A. Yes, sir.

Q. Were you or not placed in charge of room 1320 in the Farmers Bank Building at any time in the month of April?

A. Yes, sir.

Q. What day?

A. I think it was the 6th.

120 Q. And did you or not have parties in charge of that room from the 6th day of April down the the 15th day of July, night and day?

A. Well, I don't believe we did night and day watch there that length of time, but we did for a considerable time after Ap the 6th.

Q. Do you have your records?

A. We have them. I didn't know what I would be asked here

Q. Well, when did you quit having men on at night?

A. At night—well, it was up to July—but I don't remember t date.

Q. You don't remember what date in July?

A. No.

Q. Well, at any rate, who were the men that you had in charge?

A. Well, we had one man named Krull and another man nam Dorsey.

Q. Joseph Dorsey?

A. Yes; and another man named Collins.

Q. How long did Mr. Collins remain there doing that work?

A. Well, I don't know that.

Q. Well, did you have a Mr. Sheridan?

A. Yes, sir.

Q. Where is he?

A. He is in the city.

Q. Well, where does he live?

A. I don't have his address.

Q. How long has he worked for you?

121 A. He has worked for me for a couple of years.

Q. And you don't have his home address?

A. I did have until he moved a short time ago. There was period that he didn't work for me, and he moved, and I don't ha his new address.

Q. Do you know how many trips Sheridan made to New Yo with papers that were taken out of this office?

A. I don't know the number of trips.

Q. What was the last time that he made a trip to New York wi papers?

A. Sheridan?

Q. Yes.

A. I don't know that.

Q. On the 15th of July?

A. No, sir; he didn't take any in July, and he didn't take any June.

Q. Well, who took the later ones?

A. The last trip made down there was Mr. Collins.

Q. When did he go?

A. He went on the night of May the 31st and returned the 1st June.

Q. Did your brother do any work down in that place?

A. No, sir.

Q. Wasn't there at all?

A. I don't know that he was ever in the building during that time.

122 Q. Were you on duty when they drilled the safes?

A. I was not on duty at any time.

Q. Well, were you there when they drilled them?

Mr. PATTERSON. That assumes that the safes were drilled.

Mr. MARSHALL. The Government admits in their answer that the small safe was drilled.

Mr. BURDEAU. Well, that doesn't mean safes.

Mr. MARSHALL:

Q. Did you know of either one of the safes being drilled?

A. No.

Q. You did not?

A. No, sir.

Q. You were'nt there when either one of them was drilled?

A. No, sir.

Q. Were you informed by the people who employed you that they were going to be drilled?

A. No, sir.

Q. Who employed you?

A. For that particular piece of work, Mr. Scully. I believe Mr. Jones was present at the time. It was in Mr. Scully's office. I was called there.

Q. Mr. Paul Jones?

A. Yes, sir.

123 Q. The general auditor of the company?

A. Well, I don't know that.

Q. You don't know what his position is?

A. No, sir.

Q. Well, who has employed you for the work that has been done lately in this investigation?

A. Well, the same work just continued along.

Q. You are still doing work on this same thing? To whom do you make your reports?

A. My reports go to New York.

Q. To whom?

A. To a Mr. McIlwraith.

Q. Do you know who he is?

A. No; I don't know who he is.

Q. Is he connected with the Department of Justice of the United States?

A. No, sir.

Q. No?

A. No; I think he is a private detective.

Q. Who employed you for the work you were doing in connection with this case?

A. I believe they came from New York, from some place, the instructions.

Q. From McIlwraith?

A. Yes, sir.

124 Q. Did you hear about these safes being bored?

A. I did hear something said about it.

Q. Which one of your men was on duty at the time you heard the safes were bored?

Objected to by counsel for Government, as the evidence shows that only one safe was drilled.

Objection overruled and exception noted.

A. Well, I don't know when the safes were bored, if they were bored. I don't know, so I wouldn't know which one of my men was on at the time.

Q. You are in the detective business, are you?

A. Yes, sir.

Q. And you had men on down there?

A. Yes, sir.

Q. And you knew that the safes were bored in that time, but you don't know when it was?

A. Well, I didn't say I knew they were bored. I said I didn't know when it was.

Q. Well, at any rate, they were premises that you had in charge watched night and day by your men, weren't they? Down until the first of July, haven't you, and after the first of July?

A. I don't know whether it was continuous or not.

125 Q. You don't know much about it, is that it? You have told us all you know about it, have you?

A. I have answered your question.

Q. Well, tell us all you know about the matter. You have sworn to. I can't tell what you know. Tell us what you know about this matter. Not about something else, but about that room 1320 in the Farmers' Bank Building between the 6th day of April and the 15th day of July, 1920.

Objected to by counsel for Government as too general.

Objection overruled and exception noted.

Q. I will withdraw the question. Have you records down in your office, within a few blocks of here, that will show you what men were on duty on these different nights and days?

A. I think we can show that.

Q. Well, will you go and get them? It's only around the corner, isn't it?

A. Have you any specific thing that you want?

Q. No; you said you couldn't tell us without your record, and you didn't bring them because you weren't asked to bring them. And you objected to your brother being subpœnaed yesterday. You woudn't let the man subpœna your brother yesterday, would you?

Objected to by counsel for the Government.

Objection overruled.

126 A. I asked him which man he wanted.

Q. Didn't he say that young man over there?

A. No.
Q. Didn't you tell him he couldn't go over the records?
A. It wasn't necessary.
Q. You told him he couldn't get in?
A. I told him it wasn't necessary.
Q. And didn't you tell him that you would be there, that your brother wouldn't be there?
A. Maybe I did.
Q. Well, now, will you go and get your records?
A. I have no objection to doing so.
Mr. PATTERSON. What is the purpose of this?
Mr. MARSHALL. We want to show which men were on duty at different times when these safes were bored.
Mr. PATTERSON. For what purpose?
Mr. MARSHALL. For the purposes outlined when I opened.
Mr. PATTERSON. That doesn't require him to produce all of his records in that matter.
By the COURT. He has not asked for all of his records. He has asked for the records showing what men were on duty when these safes were handled in that way.
127 Mr. MARSHALL. That's all I want.
Mr. PATTERSON. Do you understand what you are to get? You are to get the records showing what men were on duty at the time these safes or one of them was drilled.
Mr. MARSHALL. I want you to bring up the records showing what men were on duty at different times. You don't know when they were drilled, so you can't tell us that. But I want to know what men were on duty continuously from the time you began there until you quit. You have your reports every day, haven't you?
A. No, we don't have reports.
Q. Can you get copies of them?
A. We didn't furnish reports.
Q. No reports furnished?
A. Not on just guarding that room, no.
Q. Did you furnish any reports with regard to the books and papers that were taken from that room?
A. We did.
Q. To whom?
A. To McIlwraith.
Q. Do you have copies of them?
A. I think so.
128 Q. Will you bring those up also?
Mr. PATTERSON. What right have they to the correspondence passing between this man and his superior?
Mr. BURDEAU. Unless it is solely for the purpose of refreshing the recollection of the witness as to dates, the Government objects, as irrelevant and immaterial to this inquiry; but the Government would have no objection to the use of them merely for the purpose of refreshing his memory as to dates.

By the COURT. Well, when they are brought here, we can pass upon their relevancy.

Witness leaves the stand.

JOHN C. KRULL, a witness called on behalf of petitioner, being duly sworn, testified as follows:

Direct examination by Mr. MARSHALL:

Q. Where do you live?

A. I live at 912 North Lincoln Avenue, Pittsburgh.

129 Q. That is on the North Side?

A. Yes, sir; old Allegheny.

Q. How long have you lived there?

A. I have lived there since the latter part of last March, 1920.

Q. Were you employed at any time by the Worley Detective Agency?

A. Yes, sir.

Q. And as an employe of that agency, were you ever in charge of room 1320 of the Farmers Bank Building?

A. Yes, sir.

Q. Do you remember what day you went to work there?

A. On the 6th of April, 1920.

Q. And what day did you quit work there?

A. I believe it was the 3rd of June, 1920.

Q. Were you on at night time or day time?

A. I was on both times. I was on during the day nearly all the time until the last two weeks. We changed about.

Q. The last two weeks?

A. Yes; the last two weeks of May—except three days in June.

Q. You were on at night for the last two weeks—except three days in June you worked in the day time?

A. Yes, sir.

Q. Do you know how many safes were in the room 1320 when you went there on April the 6th?

A. There were two safes.

Q. Were they closed or open?

A. They were closed; as far as I know, locked.

130 Q. Did you see these safes, or either of them, bored at any time?

A. Yes, sir.

Q. Just go on in your own way and tell us what you saw take place when you were on duty there as a representative of the Worley Detective Agency.

A. You mean pertaining to this particular matter?

Q. Pertaining to those two safes.

A. I believe it was the last evening of the last month in May; I am not sure, but it was the latter part of the month, that Mr. Worley brought two men over there——

Q. Which Mr. Worley?
A. Mr. A. J. Worley.
Q. Was that the head of the detective agency?
A. Yes, sir.
Q. Go on.
A. He brought these men over there: one was from some agency in New York, he gave us to understand: I am not sure whether he said he represented particularly H. L. Doherty and Company, but he came from New York City, a man named Williams: and he brought another man with him supposed to be a safe expert. He tried to open the safes. He was sent there to open the safes: he had been there once before.
Q. Do you know when he had been there before?
A. It might have been the latter part of April. I haven't any particular reason for remembering it, but it was along about that time.
131 Q. Had you seen him when he was there before?
A. Yes. I was not on duty at that time: he was there on a Sunday.
Q. The first or second time?
A. The first time he came on a Sunday.
Q. What did he try to do at that time?
A. Well, he tried the various combinations on these two safes and failed to open them. I couldn't help hear the conversation between he and Mr. Williams. He said if he had his drill there he could open the small safe by drilling into the back of it. So he went home, and later on made a second visit. And he had his drills with him, and they didn't seem to work. They were over there often working on these safes. Then they got finally—I don't know what you call it—an acetylene torch: they brought up gas tanks and that was used on these safes. I didn't understand the process. At any rate, they used a flame.
Q. What color was it?
A. Well, whatever color would come from these gases. I would call it acetylene gas.
Q. How many safes did they bore there?
A. Two.
Q. Where was the little safe bored?
A. It was bored in the back.
Q. Where was the large safe bored?
132 A. It was bored in the front, near to the combination, very close to it.
Q. Was Mr. Williams there when they were bored?
A. No, sir.
Q. He brought the men up there?
A. Yes, sir: he did.
Q. Was he there when the gas torch was used?
A. No, sir; I didn't see him if he was.

Q. But he brought these men up there?

A. Yes, sir.

Q. What did they find in the little safe?

A. Well, they found very little. They found, I believe, a knife and a ten-cent piece, besides some gas journals.

Q. Gas journals?

A. Yes; periodicals pertaining to the gas business.

Q. Publications?

A. Publications.

Q. What did they find in the big safe?

A. The big safe contained bonds and stocks and insurance policies, the property of Mr. McDowell.

Q. How do you know it was the property of Mr. McDowell?

A. Because I had instructions to make a copy of the memorandum that Mr. Williams was making. Mr. Worley instructed me to take a copy of the things that were taken out of that safe.

Q. Out of which safe?

133 A. The large safe.

Q. Was that after it had been bored or before?

A. After it. They opened it by boring it.

Q. I mean, when did Mr. Worley instruct you to make a copy of the papers that were taken out of this large safe?

A. I believe—that was done at night; the safe was opened at night—and I believe it was the next day that I received those orders.

Q. From Mr. Worley?

A. Yes, sir.

Q. Was he up there?

A. I can't recall. I can't say for sure whether he personally brought that message or whether one of the men did. I think that Mr. Worley himself or his brother had come over there; I think it was Carl Worley that came over there. I can't say positively where the orders came from to me.

Q. But from one of the Worleys?

A. Yes, sir.

Q. To take a list of the papers that were taken from that safe?

A. Yes, sir.

Q. How far did you proceed with that?

A. Well, not very far. Mr. Williams said he was tired and he wasn't going to make any other memorandum. And he tore up what I had. And I think the memorandum had been taken by the man that relieved me that day.

134 Q. Who was Mr. Williams?

A. He was a safe man that was sent from New York.

Q. Was he one of the men that Mr. A. J. Worley brought there?

A. Yes, sir.

Q. Was Mr. Scully there at any time?

A. I never saw Mr. Scully.

Q. Did you see Mr. Winans?

A. I saw him the first day I came there.

Q. The 6th of April?
A. Yes, sir.
Q. Where did you see?
A. In the first room, 1320 Farmers Bank Building.
Q. Did you see Mr. Paul Jones there?
A. Yes. That is, I was introduced to two gentlemen, one as Mr. Jones and one as Mr. Winans.
Q. Do you see Mr. Winans in court here?
A. I saw him here on the stand this morning.
Q. And recognized him?
A. Yes, sir.
Q. Do you see Mr. Jones here?
A. I have not seen Mr. Jones since that I know of.
(Gentleman in the audience requested to stand up.)
Q. Is that the man?
A. Well, I think so. He had his hat on when I saw him.
Q. What was done with these papers that were taken from
135 the large safe?
A. I understood——
Q. Did you or not see them taken from the large safe?
A. Yes, sir.
Q. And where were they placed?
A. They were placed on the table and they assorted them in different piles.
Q. How many papers that were in the large safe were taken from it?
A. I believe they were all removed from the safe.
Q. Did you leave them there with Mr. Williams? Who relieved you that night?
A. A man named Dorsey.
Q. Joseph Dorsey?
A. Yes, sir.
Q. Do you know where he is now?
A. No, I don't know. He is a resident of Pittsburgh. The last I know of he was working for the B. & O. Railroad in their police department.
Q. Did you see any person take any papers away from this office at any time?
A. Do you mean from the files?
Q. From the files, yes; I will ask you that way.
A. Yes: from the files and from the office.
Q. What did you see taken from the files?
136 A. I saw papers taken out and they were packed in, you might say, suitcases or telescopes. They were taken out and I understood——
Q. Not what you understood. What did you see done with them?
A. Well, I saw them packed in these telescopes.
Q. Did you see what was done with these papers that were taken from the large safe and placed on the table?

A. Well, I understood, but I don't know.

Q. You say you left Mr. Williams there and Mr. Dorsey?

A. Yes, sir.

Q. When you came back on your next turn after that, were those papers there at the time?

A. Why, there were two telescopes, as I was informed, packed with these papers.

Objected to by counsel for the Government.

Mr. MARSHALL:

Q. Not what you were informed.

By the COURT. Well, were the two telescopes there when you were returned?

Mr. MARSHALL:

Q. Well, were there any papers in the telescopes?

A. No, sir.

Q. Were there any papers in the safe when you got back?

137 A. Not to my knowledge.

Q. Were the doors not open?

A. Well, the safe was closed, and I had no business to open it.

Q. The papers that you had seen placed on the table were gone?

A. Yes, sir.

Q. And the two telescopes?

A. Yes, sir.

Q. Who gave you any information with regard to those telescopes?

A. The other man that I relieved, Mr. Dorsey.

Q. Joseph Dorsey?

A. Yes, sir.

Q. Did you see who took away those telescopes?

A. I didn't see them taken away.

Q. How long did they remain there after you saw them there?

A. I don't think they were there more than a day of two.

Q. Did any person inform you what had been done to those telescopes?

A. Yes.

Q. Who informed you what had been done with them?

A. Mr. Dorsey.

Q. Who was relieving you at that time?

A. Yes, sir.

Q. When you examined these papers, do you remember—you say you noticed whose papers they were, you started to make a list of them—do you remember any of the papers?

A. I remember that some of them were insurance policies

138 that had been taken out by Mrs. McDowell.

Q. What else do you remember?

A. Some of them were stocks and bonds in Mr. McDowell's name.

Q. Anything else?

A. That's all besides—all of them that were taken out of the safe that I remember, but of course I can't just offhand make a list.

Q. But, all that you examined, were they or not the private papers of Mr. McDowell?

Mr. PATTERSON. That is objected to, as calling for a conclusion of law.

By the COURT. Well, he has mentioned insurance policies in the name of Mrs. McDowell.

Q. Were they on the life of Mr. McDowell?

A. I think that any policies that I refer to were insurance policies upon property, houses, fire insurance property.

Mr. MARSHALL:

Q. Well, was there any paper that you examined the property of anybody else than Mr. McDowell and Mrs. McDowell?

A. No, not that I recollect of.

Cross-examination by Mr. BURDEAU:

Q. You say the last day you were in room 1320 was the third day of June, 1920?

139 A. Yes.

Mr. MARSHALL:

Q. Did anybody succeed you there watching that office, do you know?

A. I suppose they did; I don't know.

Q. You didn't go back?

A. I didn't go back.

Mr. BURDEAU:

Q. The safe had been emptied on the 3rd day of June, or before you left. You say the 3rd day of June, 1920, was the last day you were in that office?

A. Yes, sir.

Q. And when you left that day the safe was empty?

A. I believe it was.

Q. There were no more papers in that safe?

A. I don't believe there were.

Q. And the two suit cases had been packed before the third day of June?

A. Yes, sir.

Q. And they were gone on the third day of June before you left?

A. I believe they were.

Q. Were there any papers on the tabe the third day of June,

140 the day you left?

A. No, sir.

Q. Were there any papers in that first room, 1320, on the third of June, when you left there?

A. Not to my knowledge.

Q. Well, you looked?

A. I didn't look particularly.

Q. But you would see them?

A. Not necessarily.

Q. Did you notice any papers on the third day of June, 1920, in that room?

A. No, sir.

Mr. MARSHALL:

Q. Did you look in the private cases?

A. No; I did'nt.

Q. How many papers were taken out of that office while you were there?

A. I can't tell you the number offhand, but there were quite a number put in those suit cases that were packed and taken out.

Q. You saw them taken out?

A. Yes, sir.

Q. Who did you see take them out?

A. A man named Sheridan.

Q. That was another employe of Mr. Worley's?

141 A. Yes, sir.

Mr. BURDEAU. Q. You never met any man in 1320 that claimed to be an officer of the United States, did you?

A. No, sir.

Witness left the stand and was recalled.

Mr. MARSHALL:

Q. When on the stand you testified that Mr. Dorsey told you what was in these suit cases after you noticed that the papers which had been taken from the safe were not on the table any longer—is that correct?

A. Yes, sir.

Q. What did he tell you?

Objected to by counsel for the Government.

By the COURT. If Mr. Dorsey was personally in charge, the evidence may be received for what it is worth.

A. Mr. Dorsey told me that those papers and other private papers that had been taken from the desk, that those things were to be removed to Mr. Scully's office until some further time of settlement or something, when they would be returned to Mr. McDowell.

142 Mr. MARSHALL:

Q. Well, did he tell you whether or not they were in the telescopes?

A. Yes; that's what I understood him to say—that those papers and those different things which were the private papers and property of Mr. McDowell were in those telescopes.

Q. I forgot to ask you—did you see anything happen to the roll-top desk when you were there?

A. I saw nothing happen to it.

Q. Well, did you see anything that had happened to it?

A. I saw things had been taken out of it.

Q. Did you see any marks on it?

A. Yes; there were marks on it.

Q. What marks?

A. Well, it looked to me as though somebody had jimmied it, as we call it—had opened the lock.

Q. What did you see on the desk?

A. Well, there were things taken out about the same time as these other things were taken out, and there were letters and account books and things of that kind on the table with the other books.

Q. Any diaries?

A. Well, I don't know. I didn't really go through the things to look what they were, because it really didn't concern me.

Q. Did Dorsey tell you what he had done with the list he had
143 made of these papers?

A. Yes: the lists that we were to make were to be turned over to Mr. Worley.

Q. Do you know whether they were?

A. I can't say what he did with his; I know that what I made out were destroyed by this man Williams. He said he wasn't going to bother with it; it would take too long.

GEORGE F. COLLINS, a witness called on behalf of petitioner, being duly sworn, testified as follows:

Direct examination by Mr. MARSHALL:

Q. Do you know where Mr. Sheridan is, an employe of Worley's Detective Agency?

A. Why, as I told the gentleman who subpoened me, I heard he was out of the city, but I thought I would see him yesterday at dinner time, but I didn't see him.

Q. Where does he live?

A. He lives down back of the Colonial Hotel.

Q. What is his first name?

A. Samuel J. Sheridan.

Q. He is still working for the Worley Detective Agency?

44 A. Yes, sir.

Q. Did you do any work in 1320 Farmers Bank Building?

A. I did.

Q. What days were you on?

A. That is, you mean in the office?

Q. Yes.

A. The first work I done I done from the 10th day of June until he furniture was stored on the 15th day of July.

Q. Then you were in the office from the 10th of June until the 15th ay of July?

A. Yes, sir.

Q. And who else—any person else on duty besides you?

A. Until we kept the night man off, just had the daylight man on.

Q. Well, when did you get the night man off?

A. I think when Mr. Krull left.

Q. The third of June?
A. The 3rd or 4th of June, or somewhere around there.
Q. Where did you store this stuff?
A. Shanahan Transfer and Storage.
Q. Who ordered it stored?
A. Mr. Scully. That was what we understood from Mr. Worle
Q. Was everything taken out of the office except this big safe
A. Yes, sir.
Q. And was the big safe—was the door of it broken?
145 A. No; there was a hole drilled in the combination.
Q. There was a hole drilled in the big safe by the combination?
A. Yes, sir.
Q. Did you see the papers packed in that office?
A. No; I didn't see that.
Q. Did you see Sheridan taking any telescope out of there?
A. I did.
Q. How often did you see him taking telescopes out of there?
A. I think I helped him on one occasion.
Q. Where did he take them?
A. To New York.
Q. How far did you help him?
A. To the Union Depot.
Q. When was that, do you know?
A. Well, I think that was along about the sixth or seventh May, something like that.
Q. That was before you went to work up in the room?
A. No, sir.
Q. You weren't working up in the room until the 10th of June is that correct?
A. Not until the 10th of June.
Q. Were these suitcases addressed to anybody?
A. They were addressed to Henry L. Doherty & Company, Wall Street, New York City.
Q. Do you know what was in them?
A. As far as I understood——
146 Q. No. Do you know what was in them?
A. No; I do not.
Q. You didn't see what was in them?
A. No, sir.
Q. Only from what you were told?
A. Yes, sir.
Q. Were there any papers in there on the 10th of June when went there?
A. Well, everything was closed up. What was there I can't s
Q. What were you supposed to be guarding there?
Objected to.
Q. What were you told to guard?

A. We were told to let nobody in that office without an order from Mr. Scully.

Q. From the 10th day of June until the 15th day of July?

A. That was the orders.

Q. Were there any papers in the filing cases?

Objected to.

By the COURT. If he knows, he may answer.

A. There was'nt.

Mr. MARSHALL:

Q. Had you looked in them?

147 A. Yes, sir.

Q. Had you looked in the safe?

A. No, sir.

Q. Had you looked in the desk?

A. The desk was locked.

Q. The roll-top desk was locked?

A. Yes, sir.

Q. Was the little safe locked?

A. It looked to be locked, a couple of times.

No cross-examination.

FRANK B. BARNARD, called by petitioner, being duly sworn, testified as follows:

Direct examination by Mr. MARSHALL:

Q. Mr. Barnard, do you know Mr. Burdeau, special assistant to the United States Attorney General?

A. I have met him; yes, sir.

Q. Where did you meet him?

A. The first time in my office in Buffalo.

Q. I wish you would state whether or not he showed you at

148 that time a letter from you to Mr. McDowell.

A. Yes, sir.

Q. Did he tell you anything with regard to that letter? When was that?

A. Well, it was about three weeks ago, I guess; something like that; two or three weeks ago.

Q. Did he say anything with regard to that letter?

A. Did he say anything with regard to that letter?

Q. Yes; to you?

A. He asked me if I had written the letter and if that was my signature, and I said it was.

Q. What else did he say, if anything?

A. He says, "We got this letter from Mr. McDowell's desk; it was found in his desk."

Q. Anything further?

A. Not other than he wanted to know if I had written the letter and all about it. And then he asked me what I had received in commissions, that I received through H. L. Doherty.

Q. Just wait. This was a private letter that he said he got from Mr. McDowell's desk?

A. That's what he said; it was found in his desk.

Q. Was that or not a personal letter?

Objected to, that the letter is the best evidence.

By the COURT. The evidence is that the Government has
149 the letter. If you want to produce it, of course that can be done; but there may be a question of sufficiency of notice to the Government.

Mr. BURDEAU. Well, it isn't in this building. I could get the letter, but I would like to preserve all of the Government's rights on the main question. There is nothing secret about the letter. And I may state now, as far as my information goes, that it was a letter taken from the office in the Farmers' Bank Building. But I don't concede anything else from the testimony of this witness.

By the COURT. Well, do you concede that it was a private letter?

Mr. BURDEAU. No; I don't concede that. But I am not going to quibble about the contents of the letter. But I will get the letter and produce it here in court.

Mr. MARSHALL. When will you get the letter?

Mr. BURDEAU. Well, I don't want to interrupt the proceedings this afternoon. I will do my best to get the letter before the end of the day. But in view of the fact that I can't get the letter im-
150 mediately, I will waive my objection as to the examination of the witness as to the contents of the letter.

Mr. MARSHALL:

Q. Was it a private letter?

A. Yes, sir.

Q. And when you speak of Mr. Burdeau, you speak of the gentleman who has just been addressing the Court?

A. Yes, sir.

Cross-examination by Mr. BURDEAU:

Q. Do you recall the day I was in Buffalo?

A. I can't just say the day, Mr. Burdeau. I haven't my papers with me to tell you.

Q. Can't you remember without having your papers with you?

A. Well, I should think it was around the 18th of—I don't know. I was selling out my household goods, and I was up at the house and you called me up; I think it was around—let me see—I moved on the first of November—well it was around the first of November. I can't give the exact date. I can't possibly give it.

Q. That's the first time you ever saw me, wasn't it?

A. Yes, sir.

Q. And your memory is no clearer on the matter of the date than you have given?

151 A. No, I didn't make a note of the date, although I could tell the date if I had your letter written to me from New York.

Q. Of course, I am asking now for your independent recollection.
A. Well, it was around the first of November.
Q. That's the first time you ever saw me?
A. Yes, sir.
Q. Do you remember what I said to you when I came into the office?
A. Let me see. You first called me on the telephone at my house, and you said you were a Special Assistant Attorney General.
Q. That is exactly what I said.
A. Yes, as I remember it. And could you see me at my office that day. And I said I would be down at my office between 12 and 1, somewhere along there. And I met you there a little after 1 o'clock.
Q. That is your best recollection of it?
A. Yes, sir.
Q. Isn't it a fact that you promised to be there at 12.30?
A. Well, between 12 and 1 o'clock.
Q. Isn't it a fact that the words that you used were, "I will be there at 12.30?"
A. Somewhere between 12 and 1 o'clock.
Q. Well, will you deny you said you would be there at 12.30?
A. I may have said 12.30, but I don't remember. I remem-
152 ber of saying between 12 and 1 o'clock, or 12.30.
Q. That is as near as you can come to remembering the exact language?
A. Yes, sir.
Q. What happened after that with respect to the matter?
A. Then I went to my office and I think you came in about 1 o'clock or a little after; and you handed me your card and said you were Special Assistant Attorney General.
Q. Go on and state the conversation.
A. Then I says, "Will you have a chair?" And you sat opposite me and you said you had some papers—you asked me if I had ever had any business with J. C. McDowell? And I said I had had lots of business with him.
Q. Go on.
A. After that you produced this letter and you says, "Is that your signature?" I says, "Yes." You said, "Did you write that letter?" And I said, "Yes." And you said, "I got this letter"—you said, "This was taken from Mr. McDowell's desk; it was found in his desk."
Q. When did I say that?
A. Right at the same time.
Q. You insist that I said that?
A. In my office, yes, sir.
Q. Have you talked to anybody in Pittsburgh under subpoena as a Government witness? Have you talked to anybody about
153 McDowell's case?

A. I was in Mr. Imbrie's office and he showed me that letter.

Q. Didn't some one suggest to you that you come here and testify that I told you that letter had been taken from Mr. McDowell's desk?

A. No, sir. They showed me Mr. Lowry's letter there, which I had never seen.

Q. Do you know what was in the letter I showed you?

A. Yes.

Q. What was in it?

A. It went on to say that the Crude Oil Company, which Mr. McDowell had told me about and which I wanted to try to get to sell—and I said in the letter that if I got this property I would have to get it first through W. D. Chapman, who was a friend of mine down here, and that he would have to be considered in any commission that I might make on this deal.

Q. And in that letter you asked if there was a chance of your making $50,000 commission on it, didn't you?

A. I can't remember just that.

Q. You can't remember that, after I showed you the letter?

A. I can't remember the whole of the letter.

Q. You admitted your signature on it?

A. Yes.

Q. And you knew it was addressed to McDowell?

A. Yes, sir.

Q. Isn't it a fact that that letter asked McDowell whether
154 or not you and he couldn't make $50,000 on that transaction?

A. If that is in the letter, I did.

Q. Isn't it a fact that that letter asked McDowell whether or not the price was $750,000, and if they couldn't pay you $50,000 out of that, if he wouldn't hold the price up to $800,000?

A. I don't remember that exactly. I looked at the letter and saw that it referred to the crude oil.

By the COURT. The witness ought not to be interrogated as to the contents of the letter without producing it.

Mr. BURDEAU. He ought to be able to remember that as well as the conversation he had with me.

By the COURT. I am not so sure of that.

A. I didn't get an opportunity to read all of the letter.

Mr. BURDEAU:

Q. Didn't I ask you whether or not on that occasion you did not try to arrange with McDowell to load the selling price of that property so that you and he could split the commission of $50,000—didn't I ask you that?

A. I don't remember that conversation; no, sir.

155 A. J. WORLEY resumes the stand.

Direct examination by Mr. MARSHALL:

Q. Do you have your records with you which show how many trips Sheridan made with these papers; and the times?

A. No, sir; I thought that you wanted to know what men were on duty at certain times over there?

Q. I asked you for the other, didn't I?

A. I don't remember that.

Q. What have you?

A. I have the dates that the men were on duty at that building.

Q. Starting with the 6th of April, tell us what men were on duty at any time.

A. I can't.

Q. You can't do that?

A. I can tell you how many men were on duty over there.

Mr. BURDEAU. I object to counsel for petitioner inspecting the paper that the witness has in his hand. I don't understand the rule to be that adverse counsel can inspect papers produced by the witness.

Mr. MARSHALL. Do I understand that the witness is adverse to the truth?

A. No, sir; I am not adverse to the truth.

Q. Do you know what men worked on that case in that building?

156 A. Yes, sir.

Q. Well, tell us.

A. Mr. Krull, Mr. Collins, and Mr. Hagan.

Q. Where does he live?

A. Well, I can give you his telephone number.

Q. Well, give us that.

A. 1752 W. Hill.

Q. What is his first name?

A. Edward.

Q. You have given us three?

A. Sheridan.

Q. What is his first name?

A. S. J. Sheridan.

Q. Where does he live?

A. I haven't got his address.

Q. What is his telephone number?

A. I haven't got it.

Q. Is he working for you now?

A. Yes. I haven't got it since he changed his address some time ago.

Q. Where is he working for you?

A. He is working in the city.

Q. Whereabouts?

A. I don't know where he is now.

Q. Will he report to your office to-day?

A. Yes, sir.

157 Q. Can you have him in here at such time as the court fixes an adjournment of this case?

A. I will see him this evening.

Q. Where will you see him?

A. Well, I don't know that. Wherever he calls up and tells me where he is. I will either see him or talk to him over the telephone.

Q. Was he in your office yesterday?

A. I think he was.

Q. What time did he come in yesterday?

A. It was probably about noontime.

Q. Now have you a list of the dates that he went East with the papers from 1320?

A. No, I haven't.

Q. You haven't that?

A. No. I know he made several trips East between the time that he took that up and the time he quit.

Q. Have you any other men that worked there?

A. Joe Dorsey. Now those are the five men that worked in there and the only men that worked on the job.

Q. Have you the dates that the papers were taken from the office up to Mr. Scully's office?

A. No, I haven't.

Q. Well, how many telescopes full of papers were taken up to Mr. Scully's office?

158 A. I don't know that, and I don't know who took them up. But the great bulk of this stuff, practically all of it, was taken to New York.

Q. Did you take Williams and the other man from New York down there at the time they went down to drill the safes?

A. Well, I took Williams and another man down there.

Q. Well, didn't you tell Krull when they went down there what they were going to do?

A. No, sir; I didn't.

Q. Didn't you have them take acetylene gas up there to drill the holes in those safes?

A. No, sir; I didn't.

Q. Didn't know anything about that?

A. No, sir; I didn't.

Q. And you are the head of this detective agency?

A. Yes, sir.

Q. Will you have Mr. Sheridan here?

A. After to-day at any time.

Letter produced and marked as "Petitioner's Exhibit No. 2," and offered in evidence, the same being a letter on the letterhead of the Department of Justice.

Mr. MARSHALL. Mr. Burdeau, will you give us the letter dated February 23, 1915?

159 Mr. BURDEAU, No; that is a letter involved in this case, and I can't produce that until the court disposes of this case. As a representative of the United States, I have certain papers which I assume were taken from the office of Mr. McDowell.

Mr. MARSHALL. I submit that all of these papers should be submitted to the court, in order that the court may see that justice be done here.

Mr. BURDEAU. The time may come when I have to produce such papers as I have. But, until it does, I do not think I should produce them.

By the COURT. Of course, we have only heard one side of the case. But if the testimony offered on the part of the petitioner is to be believed, there was a grossly improper violation of the private rights of somebody. And the property is stolen property. There is no question about it, if the evidence is to be believed. And if it is stolen property, it belongs to the person from whom it was stolen, no matter whether in the hands of the United States or in the hands of a burglar in the penitentiary.

Mr. BURDEAU. That may be true, your honor, but the Federal courts are not the forum to assert that right.

160 By the COURT. These papers are alleged to be the property of the petitioner, and the court has the power and authority to order papers belonging to anybody, if they are stolen, to be returned to the person from whom they were stolen. They are subject to the order of the court.

Reference has been made here to the Weeks case. I have been thinking over the Weeks case, and that case is distinguished from this, in that in that case there was a conflict of jurisdiction between the Federal court and the police powers of the State. Here there is no conflict of jurisdiction between the Federal Government and the police powers of the State of Pennsylvania. * * * Of course, I am willing to hear counsel in opposition to my views.

Mr. PATTERSON. We would like your honor to hear us at some time on a motion that the case presented by the petitioner be dismissed upon its own showing.

By the COURT. I will be glad to hear you upon a motion of that kind.

Mr. PATTERSON. We would like to be heard upon the jurisdictional question that this court does not have jurisdiction to determine whether a wrong has been done to a citizen of the United States.

161 Mr. PATTERSON. Would your honor further indicate to us what it the best way to present this? That is, would you probably hear us first on Monday as to whether it is desirable that we should go into evidence at all?

By the COURT. I would prefer that the evidence should go in, because it is an exceedingly interesting case. And what I have said has been based upon my experience and the evidence that has been offered in the case. I must see that the rights of people are carefully

guarded. They must be guarded in every way. No matter how great a criminal a man is, his rights must be guarded fully here.

Court here adjourned until Monday, November 22, 1920, at 10 o'clock a. m.

162 And now, Monday, November 22, 1920, trial resumed at 10 o'clock a. m.

A. J. WORLEY recalled.

Direct examination by Mr. MARSHALL:

Q. When Mr. Williams came here, did he come to you with any credentials as to who he was?

A. He came to me and told me that he represented Mr. Jones, of Henry L. Doherty and Company.

Q. Paul Jones?

A. Paul Jones.

Q. And did he have any letter?

A. He didn't have a letter.

Q. Well, how did you know that he was from Mr. Doherty then, or Mr. Jones?

A. Well, I had a telephone message in advance of his arrival from Mr. McIlwraith.

Q. From whom?

A. Mr. McIlwraith, the man I mentioned Friday, who employed me in the beginning. He called on the telephone and told me that Mr. Williams was on his way.

Q. Were you subject to the orders of Mr. Scully?

A. Well, I presume I was. I would have taken any instructions he gave me.

163 Q. Who had given you your orders?

A. Well, I received them in Mr. Scully's office one day when Mr. Jones was there. I don't know whether Mr. Jones told me or Mr. Scully told me or whether the two told me.

Q. When you speak of Mr. Jones, you speak of Mr. Paul Jones, of Henry L. Doherty and Company and the Cities Service Company?

A. Yes, sir.

Q. When Mr. Williams came on here you didn't know about him going to bore the safes?

A. No; I didn't know he was going to bore the safes.

Q. Didn't you go with him to secure the acetylene gas?

A. No, sir.

Q. Was it your brother that went with him?

A. No, sir.

Q. Who went with him?

A. Nobody that I know of. Nobody from my place.

No cross-examination.

JOSEPH DORSEY, called on behalf of petitioner, being duly sworn, testified as follows:

Direct examination by Mr. MARSHALL:

Q. You are employed by the Worley Detective Agency, I believe?

164 A. Yes, sir.

Q. And were you employed by them during the months of April, May, and June?

A. Just April and May.

Q. Well, when did you quit their employ?

A. The last day of May.

Q. How do you fix that time?

A. Why, as I remember, it was the last Sunday in May that I left there, the last Sunday in May.

Q. Well, the reason I ask you is that I understood you to tell me in the hall a few minutes ago it was the last day in June.

A. I thought it was the last day of June.

Q. Well, how do you know it was not the last day of June, but was the last day of May?

A. Well, I remember of going to work for the B. & O. Railroad about the first of June. I thought it was the first of July.

Q. Then you went to work for the B. & O. immediately after you quit Mr. Worley.

A. Yes, sir.

Q. Were you working daytime or nighttime?

A. Well, we were changing about.

Q. I mean just before you left in the latter part of May?

A. I just worked one day in the daytime—the last day I left. The day I left it was just my week to take over the day turn, and I worked one day on day turn.

165 Q. How did you work, week about?

A. Yes, sir.

Q. Who relieved you?

A. Mr. Krull.

Q. Well, was there one of the safes or both of the safes in that room, 1320, bored or drilled at any time?

A. No, sir.

Q. Was there one of them drilled, I said, at any time?

A. Oh, they were drilled, but I wasn't on duty.

Q. That isn't what I asked you. Were they drilled?

A. Yes, sir.

Q. When you came on after they were drilled, did you see what had happened to the papers that had been in the large safe?

A. I saw them taken out and put in a grip.

Q. How many grips?

A. Two grips.

Q. Who took them?

A. A man named Williams and I can't recall the other man's name.

Q. And when was that?

A. Well, that was between—from the 17th of May up until—I just can't remember the date—from the 17th of May until the first of June.

Q. Sometime between the 17th of May and the first of June?

A. Yes, sir.

Q. Did you see who took those papers away?

A. Yes, I saw the man.

166 Q. Who took them?

A. This other man that came on from New York. I was introduced to him but I can't recall his name.

Q. Who accompanied him?

A. Williams.

Q. And this other man that came on from New York?

A. Yes, sir.

Q. Would you know the name if you heard it?

A. Yes, sir.

Q. McIlwraith?

A. No, sir.

Q. Jones?

A. No, sir.

Q. Have you his name?

A. I have it some place but I can't find it—in a memorandum book?

Q. Was it Winans?

A. No, sir.

Q. Doherty?

A. No, sir.

Q. Frueauff?

A. That sounds something like it.

Q. Was the the lawyer?

A. No, sir. It was something like Frueauff. It was a Jewish name.

167 Q. Was he the safe cracker?

A. No, he wasn't the safe cracker.

Q. Who was the safe cracker?

A. Williams and this Olson, I think.

Q. Olson?

A. Olson.

Q. And when the Williams that you speak of that took the papers and Olson got there, did this other man whose name sounds like Frueauff come with them?

A. No, sir: he came on later: he came about the following day. He came on and took——

Q. You say the following day—the following day after what?

A. After the safe had been opened.

Q. After the safe had been bored?
A. Yes, sir.
Q. How long did they stay here before they took the papers away?
A. He came on and got the train out that night, about 9 o'clock or 9.30.
Q. How?
A. He came up there about 5.30 in the evening and took the train back to New York about nine o'clock.
Q. Were or were not all of the papers taken from the safe at that time?
A. No, sir; they were taken at intervals, at different times, up until the first of June.
168 Q. Up until the first of June?
A. Yes, sir.
Q. And who took them out after that?
A. Mr. Collins took them once.
Q. Mr. Collins?
A. He took them the last time. He took the last that were in the safe.
Q. Did you see him take them?
A. Yes; that was the last Sunday I was there.
Q. In what did he pack them?
A. He packed them in a grip.
Q. Mr. Collins was another employe of Mr. Worley?
A. Yes, sir.
Q. Why did you allow Mr. Williams in the room?
A. Why, Mr. Worley brought him there and said that he was all right.
Q. You were not to allow——
A. Allow no one in there unless Mr. Worley brought him, or Mr. Scully, he said.
Q. By Mr. Worley or Mr. Scully, before you let them in the room?
A. Yes, sir.
Q. By Mr. Scully you mean the attorney?
A. Yes, sir.
Q. Was Mr. Scully down there when Williams was there?
A. I never met Mr. Scully.

S. J. SHERIDAN, a witness called on behalf of petitioned, being duly sworn, testified as follows:

Direct examination by Mr. MARSHALL:

Q. You are employed by the Worley Detective Agency, I believe?
A. I am.
Q. Still employed by them, are you?
A. Yes, sir.
Q. Were you employed by them during the months of April, May, June, and July?

A. Yes, sir.

Q. Were you on duty at any time in the Farmers Bank Building, in room 1320?

A. For about 25 minutes.

Q. And you had regular men on morning and evening, as I understand it?

A. Yes, sir.

Q. And did you go there on some occasions?

A. No, sir; I was just there on one occasion for about 25 minutes.

Q. When was that?

A. I believe that was when Mr. Worley took over the office from the agency that had it before.

Q. Well, that was the 6th of April, wasn't it?

170 A. I don't remember the date, Mr. Marshall.

Q. Did you ever take any papers from this office to the city of New York?

A. Yes, sir.

Q. How many different times?

A. Four times.

Q. Where did you get the papers?

A. From the files in the office.

Q. You said you were on duty there about 25 minutes, as I understood?

A. Well, I didn't consider I was on duty when I went in to get the papers. What I thought you meant was with Mr. Dorsey and Mr. Collins.

Q. Oh. Then how many times were you at work in there?

A. About five times.

Q. Well, when was the first time?

A. I can give you the date if I am allowed to look at a note.

Q. Is it in your writing?

A. Yes, sir.

Q. All right. When did you get those dates. Did you make it last night or Saturday?

A. Yes; I think yesterday.

Q. Who did you get them from?

A. I got them off of some data that I kept of the trips that I made.

171 Q. At your office?

A. Yes, sir.

Q. Have you the data here?

A. No; I haven't. There was just slips, you understand, the day I left and the day I came back.

Q. Well, have you the original data?

A. Well, this is the original data that I took off. It was only on slips of paper; nothing but the dates of the times I left Pittsburgh.

Q. Where did you get these? Did you get them from Mr. Worley?

A. No, sir; they are my own data of my own trips.
Q. Who told you when wanted to go on your trips?
A. Mr. Worley.
Q. All right. Now, tell us the trips you made.
A. The first trip was April the 18th.
Q. What did you take down that time?
A. The contents of one of the files.
Q. All right. What was the next time?
A. April 22nd.
Q. What did you take that time?
A. I don't recall whether it was the contents of the balance of the file that I took first or a new file.
Q. All right; what was the next trip?
A. April the 29th.
Q. What did you take that time?
172 A. Whatever was left in that file that I had taken previously.
Q. When was the next trip?
A. May the 9th.
Q. What did you take that time?
A. What was left in the file that I had taken previously and part of another.
Q. Did you ever take any other papers from Pittsburgh to New York?
A. Out of that office, you mean?
Q. No; in this case; from Mr. Scully's office or elsewhere.
A. No, sir.
Q. Never did?
A. No, sir.
Q. Where did you stop when you were in New York?
A. At the Wallick Hotel, 43rd Street and Broadway.
Q. Did you always deliver these papers to the same people in New York?
A. Yes, sir.
Q. To whom?
A. Mr. Jones.
Q. Paul Jones, of the Cities Service Company?
A. I believe his name is Paul; yes. He is connected with the Henry L. Doherty and Company, of 60 Wall Street.
Q. 60 Wall Street, New York City?
A. Yes, sir.
173 Q. Did you ever take any papers from this office to any other place than New York?
A. No, sir.
Q. How many different suit cases filled with papers did you take to New York?
A. Do you mean on each trip?

Q. Yes.
A. Two.
Q. Two suit cases?
A. They weren't suit cases. They were fibre packing cases, about 28 inches long.
Q. They are much larger than an ordinary suit case?
A. Well, they are longer, but they are not quite as deep.
Q. They are about how long, did you say?
A. If I remember right, they were 28 inches long—this way—and about that the other way.
Q. About 14 inches high and 28 inches long and how thick?
A. Oh, I would imagine they were less than a half inch thick.
Q. A half inch?
A. Yes. The cases were fibre paper. I can't just explain.
Q. How wide?
A. Well, about as wide as this in front of me [indicating front of witness stand].
Q. Then they would contain about a bushel of papers if they were put in there solidly or compactly?
174 A. Well, I wouldn't want to say it contained a bushel.
Q. Well, about, I say?
A. Yes, sir.
Q. And you took eight of those there at different times?
A. Yes.

By the COURT:

Q. Were these ordinary fiber telescopes?
A. Yes, your honor.

Mr. MARSHALL:

Q. Did you ever take any of the papers from the desk?
A. No, sir.
Q. Did you take any of the papers from the large safe?
A. No, sir.
Q. Were you ever in the office after the large safe was opened, drilled?
A. Yes, sir.
Q. You were?
A. Yes, sir.
Q. When was the last time you were in the office?
A. It was on a Sunday afternoon. The date I can't recall, Mr. Marshall.
Q. Well, how near to the 15th of July?
A. Well, that I couldn't say.
175 Q. Do you remember that on the 15th of July, your detective agency removed all of that stuff from the office and quit watching it?
Mr. BURDEAU. That is objected to, as leading.

By the Court. It may be a little leading with respect to this witness, but I thought there was not dispute about that. Answer the question.

A. Not to my knowledge.

Mr. Marshall:

Q. Well, when was the last time, as near as you can fix it, that you were in the office?

A. Why, I venture to say it was possibly three weeks or a month before that office was closed up. Now, I wouldn't be sure about that, Mr. Marshall. I went over there for about half an hour on a Sunday afternoon.

Q. Well, that was long after the safe had been bored?

A. Oh, yes. It was just previous to the time they closed the office. I don't know whether it was three weeks.

Q. Had the roll-top desk been broken at that time?

A. Yes.

Q. It had been broken?

A. Yes, sir.

Q. Was it jimmied?

176 A. I presume you would call it jimmied; yes, sir.

Q. You could see where a tool had been put in under the roll?

A. Yes, sir.

Q. And where it had been forced up?

A. Yes, sir.

Q. You knew, as a man of experience in matters of that kind, that that desk had been what is called jimmied?

A. Well, it was forced open.

Q. Well, that's what you call it, jimmied, isn't it?

Cross-examination by Mr. Burdeau:

Q. Mr. Sheridan, did you ever meet any person claiming to be a Federal officer in connection with the taking of any of these papers?

A. No, sir; I did not.

Mr. Marshall. Mr. Driscoll, have you on file the paper filed by Mr. Frueauff making the complaint in this case?

Mr. Driscoll. I have that filed up in the office.

Mr. Marshall. We offer in evidence, if the court please, the

177 paper dated August 11, 1920, addressed to Joseph A. Burdeau, Esq., signed by A. Mitchell Palmer, Attorney General of the United States, making the appointment of Mr. Burdeau for the purpose of showing who the real prosecutor in this case is, that it is the Cities Service Company.

I think I have already offer Exhibit No. 2, but lest I have not, offer Exhibit No. 2 in evidence, for the purpose of contradiction. And for the further purpose of showing that the private papers of C. McDowell have been used and are being used by the Government in this investigation.

Exhibit 2 is the letter on the letterhead of the Department of Justice, dated Washington, D. C., October 28, 1920, addressed to A. M. Snyder, Williamson Building, Cleveland, Ohio, and is as follows:

"SIR: I have in my possession carbon copies of the following letters:

"Letter dated February 23, 1915, addressed to you from J. C. McDowell.

"Letter dated March 8, 1915, addressed to you written by Mr. McDowell.

"I enclose copies of each of the above. Will you kindly
178 send me the originals, if you still have them in *in* your files. I require these papers in connection with the case I am investigating.

"Respectfully,

"JOS. A. BURDEAU,

"*Special Assistant to the Attorney General.*

"Enc. 20925.

"Address, Federal Bldg., New York, N. Y."

Mr. MARSHALL. Counsel for petitioner offer in evidence the original complaint made to the Attorney General of the United States of America in this case, showing that it was made on June 17, 1920; that the complaint was made on the letterhead of the Cities Service Company, 60 Wall Street, New York City, and signed by the Cities Service Company, by Frank W. Frueauff, vice president.

Counsel for the Government object to counsel for the petitioner looking over the whole of this letter, and the letter was thereupon handed to the court.

Mr. BURDEAU. In so far as the document is offered to fix the date upon which complaint was made to the Department of Justice, by the Cities Service Company, or to establish the fact that the Cities Service Company made the complaint to the Department of
179 Justice, the Government does not object. But as to the contents other than the facts stated, the Government objects, on the ground that it is a privileged communication, a confidential communication to the Government and contains matter irrelevant and immaterial to the issue in this proceeding.

Mr. MARSHALL. We would like the court to examine that letter and decide as to the relevancy of that letter to the question in issue in this case. I now offer the entire letter.

By the COURT. There are some independent statements in this letter which perhaps would be admissible. But the letter as a whole should not be received. There are certain admissions here that sustain the contention of the petitioner in this case, and it is a question in my mind as to how they shall be deprived of the benefit of those statements. But the letter as a whole should not be received.

Mr. MARSHALL. I would like of your honor would read into the record those parts of the letter which your honor thinks are competent and relevant. We will be perfectly satisfied with that.

Mr. BURDEAU. Except for the names of the parties in that
180 letter, I don't see that the Government has any objection to the whole thing going in.

By the COURT. Well, there are certain statements which I think are perhaps admissible in this issue, but those are separate and distinct from the letter as a whole. I will gladly talk at side bar with Mr. Burdeau and the United States attorney about the particular matters here, because it is a serious question.

(Conference at side bar.)

By the COURT. In looking at this letter I find three paragraphs, including the introductory paragraph, that may properly be admitted as bearing upon the controversy here. They are as follows: This being a communication under date of June 17, 1920, from the Cities Service Company to the Attorney General, at Washington, D. C.

"As requested by Mr. William C. Herron, Assistant Attorney General, at the conference in the Department of Justice on the 11th inst. between Mr. William C. Herron, Mr. Frank W. Frueauff, Mr. Timothy T. Ansberry, Esq., of Washington, and Mr. William H. Armbrecht, of Mobile, Alabama, had pursuant to the sugges-
181 tion of the Attorney General made to Mr. Arnsberry, Mr. Frueauff, and Mr. Armbrecht immediately after luncheon on the 11th, we beg to submit the following statement of facts:

* * * * * * *

"In connection with the scheme, and in order to effectuate the same, McDowell used the United States mail in the transmission of various letters to the parties who owned the properties which were so sold or offered to the Cities Service Company, and in the transmission of letters to his subordinates in the employ of the Cities Service Company and its subsidiaries in directing them to investigate and make reports on the properties, and in transmissions of letters to his coconspirators with respect to the properties and with a vision of the booty, and to various banks and trust companies directing them as to the disposition and distribution of the securities and moneys paid for the property, etc. It is not the purpose of this memorandum to give the details of these various letters. Some of them, or copies of them taken from McDowell's file, are in the possession of the Cities Service Company, and letters can be obtained by the Government, which are not accessible to the Cities Service Company. The company has, however, in its possession, letters
182 which have been written and transmitted through the mails in connection with the scheme within the three years statute of limitations, some of them being of quite recent date.

* * * * * * *

"The Cities Service Company also has in its possession portions of a diary of Mr. McDowell, in which he jots down the amount of graft, booty, or commissions which he is to receive out of a number of the transactions, and other data which will be useful in the inves-

tigation of the matter, at the file of McDowell and his confederate and associates when an indictment is secured."

(Signed) CITIES SERVICE COMPANY,
By FRANK W. FRUEAUFF,
Vice President.

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183 CORNELIUS D. SCULLY, called by petitioner, being duly sworn testified as follows:

Direct examination by Mr. MARSHALL:

Q. Were you the attorney in March, April, May, June, and July of the Cities Service Company and Henry L. Doherty & Company?

A. No, I wouldn't say that I was. To make the matter definite, I was employed in this particular matter as a representative of the Quapaw Gas Company.

Q. By whom were you employed?

A. By Mr. Charles Frueauff of the firm of Frueauff, Robinson and Sloan.

Q. He is a brother of Frank W. Frueauff?

A. Yes. He is general counsel for the Cities Service Company.

Q. And a director in the Cities Service Company?

A. I presume so. I don't know of my own knowledge.

Q. Well, the Quapaw Gas Company is one of the underlying companies of the Cities Service Company?

A. Yes, sir.

Q. And is controlled and operated by the Cities Service Company?

A. Yes, sir.

Q. And were the men in charge of room 1320 from the 6th day of April on subject to your orders—the detectives employed by the Cities Service Company or by Paul Jones connected with the Cities Service Company?

184 A. In a qualified way, yes, sir. If any occasion had arisen requiring advice, they were to consult me.

Q. Do you know who ordered the drilling of the safes?

A. No, sir.

Q. You did not?

A. No, sir.

Q. You knew they had been drilled?

A. I ascertained that the second safe had been drilled the other day when I heard the testimony here. The first safe I was advised had been drilled after it had been rifled by Mr. McDowell's representatives on the 6th of April.

Q. You mean after he had taken from that safe his securities through his attorney, Mr. A. M. Imbrie?

A. I mean that I put Mr. C. C. McGovern in charge of that office with instructions to admit no one and to permit no papers to be taken from the office. And advised Mr. Imbrie, if he wanted the safe opened—I advised him that the safe would be opened on a particular day—our office did, to wit, on the 6th of April, in the presence of him

self. When we got there, as stated by Mr. Winans, Mr. McGovern said he had been overpowered by representatives of Mr. McDowell, and the safe had been opened and the safe cleaned out, with the exception, I believe, of a jackknife.

Q. Did you employ Mr. Worley?

A. I did not.

185 Q. You say you employed Mr. McGovern?

A. I did.

Q. And put him in charge when?

A. On the afternoon of the 23d day of March in response to a telephonic communication from Mr. Charles Frueauff.

Q. And was it according to your orders that any person representing Mr. McDowell was excluded from that office?

A. It was according to my instructions that nobody should be admitted to that office without my authority, and nothing was to be taken out of that office without my knowledge.

Q. Those were your instructions to Mr. McGovern?

A. Yes.

Q. Were you acting for the Cities Service Company?

A. I was acting for the Quapaw Gas Company at that time, the lessee of that office, and had been the lessee of that office for some five or six years.

Q. You had been informed by Mr. Imbrie in March that all of the contents of that small safe were the private property of Mr. McDowell?

A. I was informed by Mr. Imbrie orally and by letter; and for that reason I felt that Mr. McDowell, if we took those those things out without his representative being present, would make unreasonable demands; and therefore I notified Mr. Imbrie to be present when I opened the safe.

Q. Isn't it a fact that you didn't intend to allow Mr. Imbrie

186 or any other representative of Mr. McDowell, or Mr. McDowell, to take a single thing at that time from the small safe, no matter to whom it belonged?

A. No, sir; that was not my intention.

Q. Isn't it a fact that you didn't intend to allow Mr. Imbrie or Mr. McDowell to take any of the stocks or bonds of the Cities Service Company from that safe when it was opened?

A. That is not a fact; no, sir. On the contrary, I assented to Mr. McDowell removing certain papers which seemed to be purely personal.

Q. Oh, that was in the large safe?

A. No, sir; that was in the small safe.

Q. An insurance policy or a deed, wasn't it?

A. No, sir; it was a note or some paper with respect, my recollection is, to the Donnan Irrigation Company.

Q. But you were informed by Mr. Imbrie that there were over a million dollars worth of securities in that safe?

A. No, sir; and Mr. Imbrie is shaking his head behind you that that was not the case.

Q. Well, you answer it. I don't care what Mr. Imbrie is doing. Weren't you informed that it contained a large number of securities?

A. No, sir; not by Mr. Imbrie, I say, sir.

Q. Where is the letter that was written by Mr. Imbrie as agent for Mr. McDowell?

187 A. That is attached to the answer.

Q. You did receive a letter of April the 5th, didn't you, from Mr. Imbrie?

A. Our office did. I was out of town.

Q. If you didn't get it, all right. You say you had an arrangement with Mr. Imbrie to meet him on the morning of the 6th?

A. We notified Mr. Imbrie to be present on the morning of the 6th, it is my recollection. My recollection is that it was Tuesday morning, the 6th of April. If Tuesday was the 7th, then it was the 7th of April. But my recollection is that it was Tuesday, and we notified him that we were going to open that small safe.

Q. And at that time you had been notified that there was nothing in that small safe except the property of Mr. McDowell?

A. In so far as this letter shows, and Mr. Imbrie's statement to me.

Q. You mean the letter of April the 5th?

A. I think the letter is dated April the 5th; yes.

Q. Did you employ a man to bore that safe?

A. No, sir.

Q. To open the safe?

A. No, sir.

Q. How did you know it was going to be opened on the 6th, then?

A. We intended to make the arrangement to open it. I was out of town between Friday and that Tuesday.

188 Q. Well, who was attending to that end of it at your office?

A. I don't know.

Q. Who was attending to it for your office for the Cities Service Company, or the Quapaw Gas Company, or Doherty and Company?

A. I don't know.

Q. Don't you know there was a safe burglar around there that morning when Mr. Imbrie went in?

A. I don't know that.

Q. You don't know that?

A. No, sir.

Q. Wasn't he there when you went down?

A. No, sir. My recollection is that I didn't get that morning as far as the office. I think I was advised of this safe breaking by Mr. Imbrie before I got to the office.

Q. Was Mr. Charles Frueauff in town that morning?

A. No.

Q. Well, were you present when Mr. Frueauff told Mr. Imbrie that if Mr. McDowell didn't turn over about a million dollars worth

of securities, or thereabouts, to the Cities service Company that Frueauff would indict him in three different States?

A. If you put that in the form of a threat, no, sir. I believe Mr. Frueauff did state that we were going to indict Mr. McDowell, and we have indicted him in the county.

189 Q. We are not asking you what you have done. You say, "we have." Who do you mean by "we?"

A. The Cities Service Company.

Q. Doherty and Company?

A. The Cities Service Company.

Q. Well, Henry L. Doherty & Company or the Cities Service Company?

A. The Cities Service Company.

Q. Didn't you request first, before you made any criminal information at all, that Mr. McDowell turn over a certain number of securities to the Cities Service Company and that you would not then prosecute him?

A. No, sir. We demanded the return of money that Mr. McDowell had improperly obtained.

Q. Did Mr. Frueauff in your presence not tell Mr. Imbrie that if he would turn over certain securities and a certain amount of money there would be no prosecution?

A. No, sir.

Q. Or, if he didn't turn you over, you would prosecute him?

A. No, sir. As put, that did not happen. We had conferences, at the instigation of Mr. Imbrie, but that was not said.

Q. You have brought no civil suits?

A. You mean the Cities Service Company has brought no civil suits?

Q. Yes.

A. As yet, none.

190 Q. And wasn't the purpose of having the Government investigate this matter in order to get information to bring civil suits?

Objected to by counsel for the Government, as calling for a conclusion, and as irrelevant to the issue here; the only question being as to whether or not the Government is rightfully in the possession of certain papers.

By the COURT. That is probably true. The question is whether the Government is rightfully in possession of these papers.

Cross-examination by Mr. BURDEAU:

Letter shown witness.

Q. Mr. Scully, you gave this letter to me, did you?

A. I think so, yes.

Q. It was taken from the files of your office?

A. Yes, sir.

Q. And when did you first see it?

A. My recollection is that I saw that first on the morning of the 6th of April; possibly not on the morning of the 6th, possibly later in the day.

Q. When did you first see Mr. Imbrie in connection with the matters you have testified about?

191 A. My recollection is it was on the morning of the 24th of March.

Q. And where did you see him?

A. In room 1321 in the Farmers Bank Building.

Q. Do you recall a conversation you had with him, in substance?

A. In substance, yes.

Q. What was it.

Objected to by counsel for petitioner, as not cross-examination.

By the COURT. I will permit the question.

A. In substance the conversation—Mr. Winans was present—the night before Miss Melus——

Mr. MARSHALL. I object to that. He was asked for the conversation on that morning, and should confine himself to answering the questions that are asked.

Mr. BURDEAU. Q. I want you to give your conversation the first time you talked to Mr. Imbrie about these transactions?

A. Mr. Imbrie announced to me that the office, room 1320, was Mr. McDowell's private office and that we had no right in there

192 whatsoever. To which I answered that room 1320 was the office and property of the Quapaw Gas Company and that we asserted our right to the exclusive possession of that and to exclude anybody else.

Q. Was anybody else present at this conversation?

A. Mr. Winans and I believe Miss Melus.

Q. Proceed.

A. Mr. Imbrie said, "I have no objection whatever to the taking of any papers belonging to the Quapaw Gas Company or the Cities Service Company. The papers in the small safe are Mr. McDowell's private papers."

Q. Did Mr. Imbrie at that time make any claim that the papers in the large safe in room 1320 were the private personal property of Mr. McDowell?

A. He did not.

Q. Did Mr. Imbrie at that time make the statement that any of the papers in the files, other than those contained in the small safe in room 1320, were private papers of Mr. McDowell?

A. Yes; Mr. Imbrie said there were private papers of McDowell's in the letter files.

Q. In room 1320?

A. Yes; in room 1320. But stated that he was perfectly willing that such papers as pertained to the Cities Service Company or any of its subsidiaries should be examined and should be taken. How-

ever, stating that Miss Melus would show Mr. Winans the
193 papers which belong to the Cities Service Company or the subsidiary companies; Mr. Winans stating that he would be the judge of whether the papers were Cities Service or Doherty papers and whether they should be taken away. And Mr. Imbrie said—he attempted to frame an agreement to the effect that if there was a dispute, Miss Melus contending that the papers were private papers, that that dispute should be referred to him and me. Mr. Winans insisting, however, that he reserved the right to say whether the papers were corporate papers or pertained to data that he was making; and we saying to Mr. Imbrie that if Mr. McDowell's rights were interfered with he had recourse to protect him. And Mr. Imbrie indicated that he would take such steps, which he has never taken.

Q. How long did that interview last?

A. I would say half an hour.

Q. Were you there when Mr. Winans and Miss Melus removed certain files from room 1320?

A. I don't think I was, although I recollect Miss Melus pulling out filing cases in room 1321, riffling them over with her fingers, and saying there were certain papers there.

Q. Did she make that statement in the presence of Mr. Imbrie?

A. That is my recollection; yes.

Q. That certain papers in room 1321 were corporate papers?

A. Yes, sir.

Q. When did you next talk to Mr. Imbrie about this matter?

194 A. I don't remember exactly. We had a number of telephone conversations and several interviews.

Q. Did you ever have a conversation with Mr. Imbrie upon the subject of opening the small safe in the presence of representatives from both sides?

A. Yes, sir.

Q. Was that before the 6th of April?

A. My recollection is that it was.

Q. Do you recall the substance of that conversation?

A. The substance of that conversation was that if there was anything in that safe that was Mr. McDowell's private property we didn't want it, but we wanted to know what was in that safe, because we had reason to believe that there was evidence of his guilt in that safe, and we wanted it opened and the contents listed.

Q. Did you and Mr. Imbrie have any conversation as to fixing the time when the opening should be had or made?

A. I went out of town on the 4th of April, on a Friday, I think, and spent the week end. And my partner, Mr. Churchill Mehard, conducted some negotiations with Mr. Imbrie with respect to that.

Q. Was April the 6th fixed as the time for opening that safe?

Mr. MARSHALL. If he wasn't present how does he know?

Mr. BURDEAU:

Q. Were you present in the Farmers Bank Building on
195 April the 6th?

A. I don't think I went to the room at all until some time after this transaction when Mr. McGovern admitted Mr. Imbrie to the office.

Q. But you went to room 1320 some time in the morning of April the 6th?

A. My recollection is I did.

Q. Do you recollect whether it was about 10 o'clock?

A. Later than that, I think.

Q. Was it 11 o'clock?

A. I think so.

Q. And in the meantime the small safe had been opened?

A. Yes, sir.

Q. Do you know whether or not it had been opened by anybody from your office?

A. No, sir.

Q. It was not?

A. It was not.

Q. On March 24, were you present in room 1320, Farmers Bank Building, in the evening?

A. Yes, sir.

Q. Who were there?

A. C. C. McGovern, and I think two of his representatives.

Q. Was Mr. Winans there?

A. At the time I was in? No, sir.

196 Q. I am talking now of March the 24th, the first day.

A. Yes; the evening of March the 24th.

Q. What time was that?

A. About a quarter of eight, I believe.

Q. Was that safe open at that time?

Mr. MARSHALL. Of course, we object to that, as not cross-examination.

By the COURT. Yes; it is not cross-examination.

Mr. BURDEAU. Then I will not pursue it.

Petitioner rests.

Mr. BURDEAU. The Government demurs to the evidence in this proceeding.

The Government moves to dismiss the petition herein, upon the following grounds:

1. That the petition does not allege facts sufficient to show any violation of the rights of the petitioner under the fourth and
197 fifth amendments of the Constitution of the United States.

2. The petition herein does not allege facts sufficient to warrant the court to make an order directing the return of any papers

now in the possession of the respondent, Joseph A. Burdeau, or the Department of Justice.

3. The petition herein does not allege that any Federal process, subpœna, or warrant was used to compel the taking of the papers referred to in the petition, or to authorize a search for or seizure thereof.

4. The petition herein does not allege that any Federal officer suggested, participated in, connived at, or had knowledge of the taking of the papers referred to in the petition.

5. That the petition herein does not allege that said papers were taken by any person claiming to have or to act under any official authority.

6. That said petition does not allege that there was any privity, understanding, or agreement between any officer or agent of the United States, or of any department thereof, and the person or persons by whom said papers were taken.

198 7. That there is no evidence showing or tending to show that the books, papers, etc., referred to in the petition were seized or taken by any officer or agent of the United States.

8. That there is no evidence showing or tending to show that any Federal warrant, subpœna, or other process was issued or used to compel the production of any of the papers or books referred to in the petition.

9. That there is no evidence showing or tending to show that any of the papers were taken by any person acting or claiming to act under any Federal official authority.

10. That there is no evidence showing or tending to show that the respondent, Joseph A. Burdeau, or any officer or agent of the United States, or of any department thereof, instigated, requested, participated in, or had knowledge of the taking of any of the books or papers referred to in the petition.

11. That there is no evidence showing or tending to show that at the time of the taking of the books and papers referred to in the petition there was any proceeding pending before any Federal

199 commissioner, or in any Federal court, or before any Federal department, against or affecting the petitioner, J. C. McDowell.

12. That there is no evidence showing or tending to show that the said books, papers, and so on, mentioned in said petition were taken from the private, personal possession or premises of the petitioner, J. C. McDowell, but the evidence herein affirmatively shows that all of said books, papers, and so on, were taken from premises leased by and under the control of the Quapaw Gas Company, a corporation.

13. That there is no evidence showing or tending to show that the respondent, Joseph A. Burdeau, or any officer or agent of the United States, took or received any of said papers from the private, personal possession of the petitioner, J. C. McDowell, but the evidence herein affirmatively shows that the Department of Justice, through

the said Joseph A. Burdeau, received whatever papers are now in its possession from parties other than the petitioner herein.

14. That the evidence herein affirmatively establishes that many of the books, papers, and so on, referred to in the petition and now in the possession of the Department of Justice and the said
200 Joseph A. Burdeau are corporate records relating to the Quapaw Gas Company and other companies owned and controlled by the Cities Service Company.

The Government further moves to dismiss, upon the following grounds:

(1) That this court has no jurisdiction to determine upon petition in a summary proceeding adverse claims to books, papers, and documents temporarily in the custody and possession of Joseph A. Burdeau, as representative of the Department of Justice.

(2) Upon the ground that the fourth and fifth amendments to the United States Constitution are limitations on the Federal Government only, and its officers and agents, and do not extend to or apply to the acts of individuals, whether lawful or unlawful.

By the COURT. The motions are overruled and exception noted to the Government.

Government rests.

201 Mr. PATTERSON. I understand that the Government does not mean to offer any evidence, but, as representing certain other parties here, I think I should perhaps put in some evidence.

By the COURT. Well, there is a question here, Mr. Patterson, whether you ought to be heard in this proceeding.

Mr. PATTERSON. Your honor will observe that the order goes to certain "other witnesses" beside those specifically mentioned.

(Mr. Patterson here read from the order.)

By the COURT. I understood the use of the word "witnesses" here to mean witnesses of like official character with those named * * *. I will permit you to offer such witnesses as may throw light upon the evidence offered on the part of the petitioner, but I say to you that I do not think that we have any control over those particular witnesses unless they are submitting themselves to our control, which apparently they are doing, if they insist upon being heard.

202 Mr. PATTERSON. After conference with my colleagues, we realize the wisdom of your honor's suggestion, and will not offer any testimony.

Mr. MARSHALL. I would like to object to the fact that Mr. Patterson now declines to say that he represents Mr. Doherty, when he has been acting in this case representing Mr. Doherty and others.

By the COURT. I don't understand that he says he doesn't represent Mr. Doherty. But he has concluded that it will perhaps be better for those whom he does represent not to submit his clients to the direction of the court by appearing in this case. As I have said I assumed that the words "other witnesses" meant witnesses of a like character with post office inspectors.

Mr. MARSHALL. We would like to have it recorded who Mr. Patterson and these other gentlemen do represent.

Mr. PATTERSON. Counsel entered their appearance to protect the rights of certain witnesses who apparently were to be called. In view of the suggestion made by the court that any persons that I name who are charged with or who have the custody of this
203 property might submit them to the jurisdiction of the court, counsel have declined to appear.

Mr. MARSHALL. You have already appeared. And I don't see how you have a right at this time to withdraw your appearance.

By the COURT. That is a matter which I have not specially considered. I did not assume at any time that we were in a controversy between Mr. McDowell and the Cities Service Company or H. L. Doherty & Company, or any witnesses who were associated with them. I have assumed that we were dealing entirely with representatives of the United States Government and with respect to papers in the hands of those representatives.

Mr. MARSHALL. I also assumed that, until I saw the appearance of Mr. Patterson and others entered here, and then I didn't know with whom we were dealing.

By the COURT. Gentlemen, I will hear anything in the way of argument that you have to offer.

Mr. BURDEAU. I have very little to say, in view of your honor's indications.

204 By the COURT. I have indicated to you that there has been a gross violation of the fourth and fifth amendments of the Constitution. I do not think that the Government has been a party to any illegal seizure. Now, the fourth and fifth amendments, as I understand, were passed for the benefit of the States against the action by the United States forbidden by those amendments. The question before the court is this: There are papers which I am satisfied were illegally and wrongfully taken from the petitioner's possession—private papers—and they are now in the hands of the Government.

Mr. BURDEAU. May I slightly emphasize the position of myself as a representative of the Government? The Government, of course, had no knowledge of these things at the time they took place. The Government obtained physical possession of these papers from a person claiming to have a right to them. The Government has no interest in the papers as such. But we got the papers certainly under an implied agreement to turn them back to the parties who gave them to the Government. We recognized their right to make a claim for the return of these papers when we got them. That was certainly the implied agreement with the Department of Justice. Now,
205 if your honor makes an order compelling us to submit these papers to a third person, it puts the Department of Justice in the position of not only breaking its moral obligation to the parties who presented these papers, but assuming that these papers have a value, it opens the door to a claim against the Government for its

implied agreement to return these papers. There is certainly no privity between the Department of Justice and the petitioner here. They came to us peaceably from a third person. Now, those papers will be subdivided into different classes. It may be that when the papers are exhibited to your honor, you will say that some of them are private papers of J. C. McDowell. Now, whether they are or not is no concern of the Government, but it seems to me that your honor should not order the immediate physical delivery of these papers to the petitioner.

By the COURT. No; I would not direct that. I would direct them to be impounded with the clerk of this court until the proceedings have been finally adjudicated. I would not for a minute hand them back to the petitioner lest they be destroyed. But the thing that controls me is that the Government ought not to use papers
206 which have been stolen. That is the broad ground upon which I have acted in this case.

Mr. BURDEAU. Your honor may make such an order as you deem proper, and it will, of course, be immediately obeyed.

By the COURT. I will sign such an order to put the papers in the hands of a representative of the United States attorney and the post-office inspectors, under the control of the Department of Justice. In other words, they should be impounded and sealed and deposited with the clerk of this court.

Mr. BURDEAU. Of course, that covers only such papers as came originally from the office in the Farmers Bank Building?

By the COURT. Certainly. But there is this about it, all memoranda and all information that came from those papers ought likewise to be impounded and not used. No matter if Mr. McDowell were the biggest crook that walks the streets, and no matter what wrong has been done to the Cities Service Company, those papers have been wrongfully taken from him, as I must find under
207 the evidence, and he is entitled to have them back before they are used against him.

Mr. BURDEAU. But, your honor, I have made such memoranda as I conceive to be of importance to the Department of Justice.

By the COURT. If they were made from the records that were taken from that office down there, they should not be used. Should this court ratify and approve the proceedings that have taken place in this case, there would be no necessity for a consideration of the valuable protection accorded by the fourth and fifth amendments of the Constitution. Because anybody could proceed to rifle private papers and turn them over to the Government, and the Government could escape the consequences. * * * If counsel for the petitioner will draw up an order along the lines I have suggested, those papers and all memorandum made from them shall be impounded, and they should be sealed and deposited with the clerk until the final determination of the legal questions raised here.

Mr. BURDEAU. Of course that raises a question which may result in the delay of certain memoranda. I shall have to ask your
208 honor to indulge me reasonably in making that order, for the purpose of comparison. I will have to compare memoranda with original documents to ascertain what came with Pittsburgh.

By the COURT. Of course any papers that you have not in your possession you can not control, but if they came to you, you should return them.

Mr. MARSHALL. I should like to ask that counsel for petitioner be present to check them up when they are deposited under seal.

Mr. BURDEAU. This is not a discovery proceeding. I think the court will feel that I will turn over everything that came from Pittsburgh that I have ever had.

Mr. IMBRIE. It is not from Pittsburgh. It is in your possession, sir.

Mr. BURDEAU. Oh, no. I don't undertake to give over everything in my possession, whether it came from Pittsburgh or not.

By the COURT. No; we don't touch anything that was taken elsewhere than from the office in the Farmers' Bank Building. I don't understand that the petitioner claims that. But it is proper
209 that the parties should have the right to check up the papers before they are sealed.

Mr. BURDEAU. Well, that would be more or less in the nature of a reference to some official?

By the COURT. It can be done by anybody in the presence of the clerk. And then the clerk will seal them and impound them until this proceeding is finally determined.

When such an order is prepared, I will sign it, and I will grant an exception to the Government.

210 I hereby certify that the foregoing pages contain a correct transcript of all the evidence taken in the hearing in the case In re Application of J. C. McDowell, for the return of certain private books and papers and so on, at No. 404, May term, 1920, together with the offers of counsel, the objections thereto, and the rulings thereon, at hearing held November 19th and 22nd, 1920.

LUCY DORSEY IAMS,
Official Reporter.

Pittsburgh, Pa., November 23, 1920.

211 I, Charles P. Orr, judge of the District Court of the United States for the Western District of Pennsylvania, do hereby certify that the foregoing is a true transcript of all the evidence, offers of counsel, objections thereto, and rulings of the court thereon, in the case In re Application of J. C. McDowell, for the return of certain private books and papers and so on, at No. 404, May term, 1920; all of which, so certified, is ordered to be filed and to become part of the record, this 30 day of Nov., 1920.

CHAS. P. ORR,
Trial Judge.

212 *Petition for appeal.*

In the District Court of the United States for the Western District of Pennsylvania.

In re Application of J. C. McDowell for the return to him of certain private books, papers, memoranda, correspondence, and other data now in the possession of Joseph A. Burdeau, special assistant to the Attorney General of the United States, and other persons connected with and associated with the said Joseph A. Burdeau.
Filed Nov. 29, 1920.

J. WOOD CLARK, *Clerk.*

To the Honorable Charles P. Orr, judge of said court:

Now comes Joseph A. Burdeau as special assistant to the Attorney General of the United States, and feeling himself aggrieved by the final order of this court entered on the twenty-third day of November, 1920, hereby prays that an appeal may be allowed to him from the said order to the Supreme Court of the United States, and in connection with this petition your petitioner herewith presents his assignment of errors.

Petitioner further prays that an order of supersedeas may be entered herein pending the final disposition of the cause.

JOSEPH A. BURDEAU,
Special Assistant to the Attorney General.
D. J. DRISCOLL,
United States Attorney.

213 *Petition for appeal.*

In the District Court of the United States for the Western District of Pennsylvania.

In re Application of J. C. McDowell for the return to him of certain private books, papers, memoranda, correspondence, and other data now in the possession of Joseph A. Burdeau, special assistant to the Attorney General of the United States, and other persons connected with and associated with the said Joseph A. Burdeau.

Upon the foregoing petition for appeal, and upon consideration of the assignment of errors presented therewith, it is ordered that the appeal as prayed for be, and is herewith, allowed.

CHAS. P. ORR,
United States District Judge.

Nov. 29, 1920.

(Endorsed:) No. 404. May term, 1921. In the District Court of the United States for the western district of Pennsylvania. In re

application of J. C. McDowell, for the return to him of certain private books, papers, memoranda correspondence and other data, now in the possession of Joseph A. Burdeau, special assistant to the Attorney General of the United States, and other persons connected with and associated with the said Joseph A. Burdeau. Petition for appeal and order. Filed Nov. 29", 1920. J. Wood Clark, clerk. D. J. Driscoll, U. S. attorney.

Service of a copy of the within petition for appeal and order is hereby admitted. Pittsburgh, Pa., November 29th, 1920.

A. M. IMBRIE,
Attorney for Petitioner, Appellee.

215 *Petition for appeal.*

In the District Court of the United States for the western district of Pennsylvania.

In re application of J. C. McDowell, for the return to him of certain private books, papers, memoranda, correspondence, and other data, now in the possession of Joseph A. Burdeau, special assistant to the Attorney General of the United States, and other persons connected with and associated with the said Joseph A. Burdeau. Filed Nov. 29, 1920.

J. WOOD CLARK, *Clerk.*

Now comes the appellant, Joseph A. Burdeau, special assistant to the Attorney General, and in connection with his petition for appeal says that in the record proceedings and in the final order aforesaid, manifest error has intervened to the prejudice of the appellant, to wit:

1. The court erred in denying appellant's motion to dismiss the petition herein.

2. The court erred in holding and deciding that any of the books, papers, memoranda, letters, copies of letters, correspondence, diaries, or other data mentioned in the petition were illegally or unlawfully taken from the petitioner herein.

3. The Court erred in holding and deciding that the certain books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data, or either or any thereof, were taken from the private possession of the petitioner, J. C. McDowell.

4. The court erred in holding and deciding that said petitioner, J. C. McDowell, is entitled to the return of said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data.

5. The court erred in overruling appellant's motion to dismiss upon the ground that the petition does not allege facts sufficient to show any violation of the rights of the petitioner under the fourth and fifth amendments to the Constitution of the United States.

6. The court erred in overruling appellant's motion to dismiss upon the ground that the fourth and fifth amendments to the United

States Constitution are limitations on the Federal Government only, and its officers and agents, and do not extend or apply to the acts of individuals, whether lawful or unlawful.

7. The court erred in overruling appellant's motion to dismiss upon the ground that the petition herein does not allege that any Federal process, subpœna or warrant was used to compel the taking of the papers referred to in the petition, or to authorize a search for or seizure thereof.

8. The court erred in overruling appellant's motion to dismiss upon the ground that the petition does not allege that any Federal officer suggested, participated in, connived at, or had knowledge of the taking of the papers referred to in the petition.

9. The court erred in overruling appellant's motion to dismiss upon the ground that the petition does not allege that said papers were taken by any person claiming to have, or to act under, any official authority.

10. The court erred in overruling appellant's motion to dismiss upon the ground that there is no evidence showing, or tending to show, that the books, papers, memoranda, letters, copies of letters, correspondence, diaries and other data referred to in the peti-
217 tion were seized or taken by any officer or agent of the United States.

11. The court erred in overruling appellant's motion to dismiss upon the ground that there is no evidence showing, or tending to show, that any Federal warrant, subpœna, or other process was issued or used to compel the production of any of the papers or books referred to in the petition.

12. The court erred in overruling appellant's motion to dismiss upon the ground that there is no evidence showing, or tending to show, that any of the papers were taken by any person acting or claiming to act under any Federal official authority.

13. The court erred in overruling appellant's motion to dismiss upon the ground that there is no evidence showing, or tending to show, that the respondent, Joseph A. Burdeau, or any officer or agent of the United States, or of any department thereof, instigated, requested, participated in or had knowledge of the taking of any of the books or papers referred to in the petition.

14. The court erred in overruling appellant's motion to dismiss upon the ground that there is no evidence showing, or tending to show, that at the time of the taking of the books and papers referred to in the petition there was any proceeding pending before any Federal commissioner, or in any Federal court, or before any Federal department, against or affecting the petitioner, J. C. McDowell.

15. The court erred in overruling appellant's motion to dismiss upon the ground that there is no evidence showing or tending to show that the said books, papers, and so on mentioned in said petition were taken from the private, personal possession or premises of the petitioner, J. C. McDowell, but the evidence herein
218 affirmatively shows that all of said books, papers, and so

on were taken from premises leased by and under the control of the Quapaw Gas Company, a corporation.

16. The court erred in overruling appellant's motion to dismiss upon the ground that there is no evidence showing or tending to show that the respondent, Joseph A. Burdeau, or any officer or agent of the United States, took or received any of said papers from the private, personal possession of the petitioner, J. C. McDowell, but the evidence herein affirmatively shows that the Department of Justice, through the said Joseph A. Burdeau, received whatever papers are now in its possession from parties other than the petitioner herein.

17. The court erred in overruling appellant's motion to dismiss upon the ground that the evidence herein affirmatively established that many of the books, papers, and so on referred to in the petition, and now in the possession of the Department of Justice and the said Joseph A. Burdeau, are corporate records relating to the Quapaw Gas Company and other companies owned and controlled by the Cities Service Company.

18. The court erred in ordering the appellant, Joseph A. Burdeau, as special assistant to the Attorney General, and the Department of Justice, its officers and agents, and the Post Office Department of the United States, its inspectors and agents, or either or any of said parties to produce and deliver to J. Wood Clark, Esq., clerk of the United States District Court for the Western District of Pennsylvania, all or any of said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data mentioned in the petition herein.

19. The court erred in ordering the said Joseph A. Burdeau and the Department of Justice, its agents, officers, and employees,
219 and the Post Office Department of the United States and its agents, officers, and employees, or either or any of said parties to produce and deliver to the clerk of said court all or any copies, memoranda and data of whatsoever nature taken from or coming into the possession of them or any of them through, by the use of, or through knowledge acquired from an inspection of said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data.

20. The court erred in ordering that the said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data remain impounded until the determination of the appeal herein.

21. The court erred in ordering that the said petitioner, J. C. McDowell, his attorneys, or any of them, will have the right, after the expiration of ten days from the date of said order, to inspect and make such memoranda and take such data from said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data as they may desire.

22. The court erred in ordering that the said Joseph A. Burdeau, special assistant to the Attorney General, and the Department of Justice, its officers and agents, be restrained and enjoined from pre-

senting to any United States commissioner, grand jury, or any judicial tribunal any of said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data, or any copies of memoranda made therefrom, or any evidence of any nature whatsoever secured through, or coming into their possession as the result of knowledge obtained by them from an inspection of said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data.

23. The court erred in admitting the following evidence,
220 and in overruling the appellant's objection thereto:

"Q. All right, I will withdraw it. Did you, as the agent and representative of Dougherty and Company of the City Service Company, have both of the safes in this office, 1320, drilled and opened?

Question objected to by counsel for the United States; unless it is shown that at the time it was the private individual act of the witness, as a representative of the corporation named.

Counsel for witnesses object to the question, for the reason that it has not been shown that the witness was acting with any Federal authority whatever.

In support of the objections noted by both counsel, the case of Weeks *vs.* United States, 232 U. S., was cited.

By the COURT. I will overrule the objections and note an exception.

Question read.

Mr. PATTERSON. One moment. The witness is called by the other side and we don't think should be cross-examined by them.

By the COURT. I overrule the objection.

Mr. BURDEAU. The Government objects to the question, also.

By the COURT. I will overrule the objection and note an exception."

221 Wherefore, appellant prays that the said order of the District Court of the United States may be reversed and held for naught.

JOSEPH A. BURDEAU,
Special Assistant to the Attorney General.
D. J. DRISCOLL,
United States Attorney.

222 (Endorsed:) No. 404. May term, 1921. In the District Court of the United States for the Western District of Pennsylvania. In re application of J. C. McDowell, for the return to him of certain prviate books, papers, memoranda, correspondence, and other data, now in the possession of Joseph A. Burdeau, special assistant to the Attorney General of the United States, and other persons connected with and associated with the said Joseph A. Burdeau. Assignments of error. Filed Nov. 29, 1920. J. Wood Clark, clerk. D. J. Driscoll, U. S. attorney.

Service of a copy of the within assignments of error is hereby admitted.

Pittsburgh, Pa., November 29, 1920.

A. M. IMBRIE,
Attorney for Petitioner, Appellee.

223 *Citation.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

To J. C. McDowell, greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court to be holden at the city of Washington, D. C., on the 29th day of Dec. next, pursuant to an appeal filed in the office of the clerk of the District Court of the United States for the Western District of Pennsylvania, wherein Joseph A. Burdeau is appellant and you are appellee, to show cause if any you know or have to say why the order of court or decree rendered against the said appellant, as in the said appeal appears, should not be duly reversed, and full and speedy justice done to the parties aforesaid in this behalf.

Witness my hand this 29th day of Nov., 1920.

CHARLES P. ORR, *Judge.*

Service of the above citation accepted this 29th day of November, 1920.

A. M. IMBREE,
Attorney for Petitioner.

224 In the Supreme Court of the United States.

October term, 1920.

JOSEPH A. BURDEAU, SPECIAL ASSISTANT to the Attorney General of the United States, appellant, *v.* J. C. McDOWELL, ETC., APPELLEE.	No. 404. May Term, 1921. In Equity.

Filed Dec. 4, 1920.

J. WOOD CLARK, *Clerk.*

Order allowing supersedeas.

Upon the petition of Joseph A. Burdeau, appellant in the above-stated cause, for an order of supersedeas staying proceedings under an order of the United States District Court for the Western District of Pennsylvania, made the 23d day of November, 1920, by the Honorable Charles P. Orr, district judge, in a proceeding pending

in said court entitled "In re application of J. C. McDowell for the return to him of certain private books, etc., now in the possession of Joseph A. Burdeau et al.," upon consideration of the premises it is,

Ordered, that so much of said order of said District Court for the Western District of Pennsylvania, made the 23d day of November, 1920, as provides that at the end of the period of ten days from the date of said order the books, papers, letters, memoranda, copies of letters, correspondence, diary, and other data and memoranda made therefrom heretofore impounded under said order, be delivered to the said J. C. McDowell or his attorneys, be and the same hereby is stayed pending the determination of the appeal therefrom to the Supreme Court of the United States and until the further order of said court: and it is further

225 Ordered, that so much of the aforesaid order of the said District Court of the United States for the Western District of Pennsylvania as directs that after the said period of ten days from the date of said order, the said J. C. McDowell, his attorneys, or any of them, shall have the right to inspect and make such memoranda and take such data from the said papers, impounded as aforesaid, as they may desire, be and the same hereby is stayed pending the determination of the appeal therefrom to the Supreme Court of the United States and until the further order of said court; and it is further

Ordered, that J. Wood Clark, clerk of the United States District Court for the Western District of Pennsylvania, keep all the said books, papers, memoranda, letters, copies of letters, correspondence, diary, and other data and said memoranda made therefrom, impounded as aforesaid, securely under seal and shall not permit or allow the said J. C. McDowell, or his attorneys or representatives, or Joseph A. Burdeau, special assistant to the Attorney General, or any other person to inspect or examine the same or any of them or make any copies thereof or memoranda therefrom until the determination of the appeal from said order to the Supreme Court of the United States and until the further order of said court.

MAHLON PITNEY,

Associate Justice of the Supreme Court of the United States.

Washington, D. C., December 3, 1920.

226 In the District Court of the United States for the Western District of Pennsylvania.

In re application of J. C. McDowell, for the return to him of certain private books, papers, memoranda, correspondence and other data, now in the possession of Joseph A. Burdeau, special assistant to the Attorney General of the United States, and other persons connected with and associated with the said Joseph A. Burdeau.

Filed Dec. 7, 1920.

J. WOOD CLARK, *Clerk.*

An appeal having been taken by Joseph A. Burdeau, special assistant to the Attorney General, from an order made in the above proceedings on the 23d day of November, 1920, I hereby waive summons and severance on said appeal and consent that said appeal may be prosecuted by said Joseph A. Burdeau.

Dated, December 6, 1920.

D. J. DRISCOLL,
United States Attorney.

227 In the District Court of the United States for the Western District of Pennsylvania.

In re application of J. C. McDowell for the return to him of certain private books, papers, memoranda, correspondence, and other data, now in the possession of Joseph A. Burdeau, special assistant to the Attorney General of the United States, and other persons connected with and associated with the said Joseph A. Burdeau.

Filed Dec. 7", 1920. J. Wood Clark, clerk.

To J. WOOD CLARK, Esq.,
Clerk of the District Court of the United States for the Western District of Pennsylvania.

SIR: Please incorporate in the record on appeal in the above cause in which Joseph A. Burdeau, special assistant to the Attorney General, is appellant and J. C. McDowell is appellee, the following, to wit:

1. Docket entries.
2. Petition of J. C. McDowell dated November 12, 1920.
3. Rule to show cause " " 12, 1920.
4. Answer of Joseph A. Burdeau.
5. Answer of D. J. Driscoll, United States attorney.
6. Transcript of testimony and proceedings.
7. Order dated November 23, 1920, and opinion.
8. Petition for appeal.
9. Order allowing appeal.
10. Citation.
11. Order of Mr. Justice Mahlon Pitney granting supersedeas.
12. Stipulation waiving summons and severance.
13. Order certifying record.
14. Praecipe to prepare record on appeal.

D. J. DRISCOLL,
United States Attorney.
JOSEPH A. BURDEAU,
Special Assistant to the Attorney General.

Dated, Pittsburgh, Pa., December 6, 1920.

It is stipulated that the above shall be the record on appeal from order dated November 23, 1920, and that the above-mentioned papers, pleadings, and transcript and orders shall be the entire record.

A. M. IMBRIE,
Attorney for Petitioner-Appellee.

Dated, December 7, 1920.

228 CBS

E Pluribus Unum.

United States (Eagle, etc.) of America.

191

DEPARTMENT OF JUSTICE,
Washington, D. C., October 30, 1920.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed papers are a true copy of the original appointment of Joseph A. Burdeau, a carbon copy being on file in this department.

In witness whereof, I have hereunto set my hand and cause the seal of the Department of Justice to be affixed, on the day and year first above written.

For the Attorney General:
[SEAL.]

R. P. STEWART,
Assistant Attorney General.

CES.

229 Address reply to "The Attorney General" and refer to initials and number. EJB–CEH.

DEPARTMENT OF JUSTICE,
Washington, D. C., August 11, 1920.

JOSEPH A. BURDEAU, Esq.,
Washington, D. C.

SIR: You are hereby appointed special assistant to the Attorney General to assist in the investigation and prosecution of the case of the United States vs. McDowell, now under investigation by the Post Office Department in connection with alleged frauds and use of the mails in furtherance thereof, upon complaint of the Cities Service Company, now pending in the Western District of Pennsylvania.

You are hereby authorized and directed to conduct grand jury proceedings in the Western District of Pennsylvania or in any other judicial district of the United States where it may be necessary in connection with this case.

Your compensation will be at the rate of $4,800 per annum, and you will also be allowed your actual traveling and operating
230 expenses and $4 per diem in lieu of subsistence when absent

from your official headquarters at New York City in connection with the above case.

This appointment is to take effect September 1, 1920.

Your compensation, expenses, and per diem will be paid from the appropriation for "Pay of special assistant attorneys, United States courts."

You should execute and file the required oath of office.

Respectfully,

A. MITCHELL PALMER,
Attorney General.

231

J. C. McDOWELL,
FARMERS BANK BUILDING,
Pittsburgh, Pa., January six, 1919.

Mr. R. C. RUSSUM,
Treasurer, Bartlesville, Oklahoma.

MY DEAR RUSSUM: I enclose herewith a renewal lease for room #1320, Farmers Bank Building, from the first day of April, 1919, to the 31st day of March, 1920, at $800.00 per year.

You will note this rental has been increased from $720.00 per year to $800.00. You understand, of course, that I pay the rental for room #1321 personally, room #1320 (the enclosed lease) being paid by the Quapaw Gas Company.

I received quite a discount from the regular rate when I moved in this building and they are now simply taking off the discount and putting the rental back to the normal rate at which I do not think we can complain.

Will you kindly execute the enclosed lease and return to me at this office?

Thanking you in advance, I am,

Very truly, yours

1-Enc. J. C. McDOWELL.
JCMcD-M. M.

232 MEHARD, SCULLY & MEHARD,
1014 Frick Building,
Pittsburgh, Pa.

DEAR SIRS: This is to notify you that the small safe in room 1320, Farmers Bank Building, which is now in your possession, and from which Mr. McDowell has been excluded, is the private property of Mr. J. C. McDowell, and contains valuable papers and securities, some of which are held by Mr. McDowell in trust; and that inasmuch as you have seen fit to take exclusive possession of this property, we will hold you and your clients responsible for any violation of Mr. McDowell's rights, or for any loss that he may sustain by reason of your illegal retention of his property.

Although we have made frequent verbal demands for said property, that is the safe heretofore mentioned and the contents thereof, we now make this formal demand for leave to remove it.

Very truly, yours,

A. M. QUEBOIS,
Atty. for J. C. McDowell.

April 5, 1920.
AMI/MKM.

233 This agreement, made this 26th day of December, 1919, by and between Farmers Deposit National Bank, of Pittsburgh, Pa., hereinafter called the lessor, of the first part, and Quapaw Gas Co., hereinafter called the lessee (all words herein referring to the lessee to be taken to be of such gender and number as the circumstances may require, and if the lessee be more than one person, the provisions hereof to be taken to bind and apply to them jointly and severally), of the second part.

Witnesseth, that the said lessor does hereby demise and let unto the said lessee, and the said lessee doth hereby hire and take the office or offices known as room No. 1320 on the 13th floor of the Farmers Deposit National Bank's Building, situate on the northeast corner of Fifth Avenue and Wood Street, in the second ward of the city of Pittsburgh, Pennsylvania, to be used as the company's office, and for no other purpose, for the following term, to wit: From the first day of April, 1920, to and including all of April 30, 1921, for the yearly rental of nine hundred sixty ($960.00) dollars, payable in monthly installments of eighty ($80.00) dollars, in lawful money of the United States, in advance on first business day of each calendar month, beginning the first day of April, 1920, until the expiration of said term, at the office of said bank.

The above letting is upon the following terms and conditions:

(1) Lessee will, without any previous demand therefor, pay the rent as above provided; and if said rent shall at any time be unpaid, or the leased premises shall be deserted or vacated, lessor may enter the same, either by force or otherwise, without being liable to any prosecution or action therefor, and may distrain for rent, and also relet the said premises, as agent of lessee, for any unexpired portion of the term, and receive and keep the rent therefor until the whole amount due the lessor is satisfied. Lessee also agrees that all property on the said premises, and all property removed therefrom for thirty day after such removal, shall be liable to distress for rent, and for all costs of distress, lessee hereby waiving the benefit of all laws made or to be made, exempting property from levy and sale, either on distress for said rent, or on a judgment for rent, or for damages.

(2) If the said rent shall at any time be in arrear and unpaid, or if lessee shall fail to comply with any other of the covenants, terms or conditions of this lease, or with any notice given under the terms hereof, or if the lessee shall make an assignment for the benefit of creditors or shall be declared a bankrupt or insolvent, or if an execution shall issue against or a receiver shall be appointed for the lessee this lease may, at the option of the lessor, be forthwith forfeited and

terminated. And upon the termination of this lease by forfeiture, lapse of time, or otherwise, howsoever, in any such case, and whenever lessor shall have the right to enter upon said leased premises upon the nonpayment of rent or otherwise, any attorney may, at any time thereafter, as attorney for lessee, at the request of lessor, sign an agreement for entering in any competent court an amicable action and judgment in ejectment to any term (without any stay of execution or appeal) against lessee, and all persons claiming under lessee for the recovery by lessor of possession of the hereby demised premises, without any liability on the part of said attorney, for which this shall be a sufficient warrant; and thereupon a writ of habere facias possessionem may issue forthwith, without any prior writ or proceeding whatsoever, and lessee hereby releases to lessor all errors and defects whatsoever in entering such action or judgment, or causing such writ of habere facias possessionem to be issued, or in any proceeding thereon or concerning the same; and a copy of this lease with any modifications thereof being filed in said action, it shall not be necessary to file the original as a warrant of attorney, any law or rule of court to the contrary notwithstanding; and upon the termination of this lease by forfeiture, lapse of time or otherwise, in any such case the lessor shall have and is hereby given the right to summarily reenter upon and repossess itself of said demised premises, dispossessing said lessee, and expelling him therefrom, and to use such and so much force as may be necessary for that purpose, without thereby incurring any liability whatever to said lessee. No such determination of this lease, nor taking or recovering possession of the premises, shall deprive lessor of any other action, right, or remedy against lessee for possession, for rent, or for damages, nor shall any distress or suit for rent or damages prevent lessor from proceeding to recover possession on a breach of any of the terms or conditions hereof.

(3) If, during the term of this lease, the building is so injured by fire or other casualty, not occurring through lessee's negligence, that the demised premises are rendered wholly unfit for occupancy, and said demised premises cannot be repaired within sixty days from the happening of such injury, then this lease shall cease and determine from the date of such injury. In such case lessee shall pay the rent apportioned to the time of injury and shall immediately surrender the leased premises to lessor, which may enter upon and repossess the same. If such injury can be repaired within sixty days thereafter, lessor may enter and repair, and this lease shall not be affected, except that the rent shall be apportioned and suspended while such repairs are being made; but if said premises shall be so slightly injured by fire or other casualty as not to be rendered unfit for occupancy, then the said lessor agrees that the same shall be repaired with reasonable promptitude, and in that case the rent accrued or accruing shall not cease or determine. In no event shall lessor be held liable for any loss or damage sustained by lessee by reason of fire.

(4) Lessee will, during the term, keep, and at the expiration thereof, deliver up, the said premises in as good order and condition as the same are at the beginning of the term, reasonable wear and tear and damage by fire or other casualty, not occurring through lessee's negligence, excepted. Lessee shall not make any alterations, additions, or improvements without lessor's written consent first
234 endorsed hereon, and all alterations, additions, or improvements made by either of the parties hereto upon the premises, except movable office furniture put in at the expense of lessee, shall be the property of lessor, and shall remain upon and be surrendered with the premises at the termination of this lease, without molestation or injury.

(5) Lessee shall not use, or allow to be used, the said premises for any other purpose than above mentioned, nor manufacture any commodity, or prepare or dispense foods or beverages therein, nor assign the said lease, nor underlet the said premises, or any part thereof, without the written consent of lessor first endorsed hereon. This covenant shall apply as well to an involuntary transfer by operation of law, whether by execution, insolvency, or bankruptcy, as to a voluntary assignment or underletting. In case of a breach by the lessee of any of the covenants of this paragraph, the lessor, at its option, instead of enforcing the forfeiture above provided for, can require the lessee to pay for the use of said demised premises an increased rental equal to double the rental hereinbefore reserved, payable by the lessee and his subtenant, assignee or licensee, in equal monthly installments at the times and place and in the manner hereinbefore prescribed for the payment of the rent hereinbefore reserved; such increase in rent to be apportioned and computed from the date of such breach.

(6) The rules and regulations in regard to the Farmers Deposit National Bank's Building printed upon the reserve side of this lease, and such alterations, additions, and modifications thereof as may from time to time be made by lessor, shall be considered a part of this agreement, with the same effect as though written herein, and lessee covenants that said rules and regulations shall be faithfully observed by lessee, the employees of lessee, and all persons invited by lessee into said building, the right being hereby expressly reserved by lessor to add to, alter, modify, or rescind from time to time such rules and regulations.

(7) If the rent shall at any time be in arrear and unpaid, or if the lessee shall fail to comply with any other of the covenants, terms of conditions of this lease, or with any notice given under the terms hereof, or if an execution shall be issued against the lessee, or the lessee make an assignment for the benefit of creditors, or if a petition to have him adjudicated a bankrupt be filed, or if by any occurrence or proceeding his estate be brought into liquidation by his own act or the operation of law, then and in any such case the rent for the entire unexpired part of the term of this lease shall thereupon imme-

diately become due and payable and the payment thereof be secured and enforcible by all and every of the means, remedies, securities, and proceedings given or allowed by law, equity, or this agreement, for the securing and enforcing of the payment of the rent herein reserved. Provided, nevertheless, in such case that the lessor, at its option, exercisable at any time before the whole of said rent is actually paid (even though judgment therefor has been entered), can forfeit and end the term at and as of any date then present or future, thereby waiving and releasing so much of its claim for rent as appertains to the part of the term so extinguished.

(8) It is further agreed between the parties hereto that any agreement to continue the tenancy without mention of the terms on which the premises are to be held, or a holding over after the expiration of the term with the consent of the lessor, shall be a renewal of this lease with all its covenants, provisions, and stipulations, for the term of one year only from the expiration of the term, and so for every year thereafter during which such tenancy shall be continued or holding over take place.

(9) Lessor will keep in operation in said building at all times one or more passenger elevators, as may be necessary to maintain a prompt and efficient elevator service. All ordinary cleaning, repairing, and restoring of said elevators shall be effected out of ordinary business hours as far as possible, but in case it becomes necessary or proper at any time, from accident, or for extraordinary repairs or improvements, lessor may suspend the operation during the day of any one or more of them, or of all in case of special necessity, but in such case due diligence shall be used to complete the work.

(10) Lessor will keep in operation in said building a steam-warming apparatus for the use of tenants, during such periods as the same may be necessary, between the first day of October and the thirty-first day of May of each year, and will cause said demised premises to be cleaned and cared for by the janitor of the building, and will also furnish a reasonable amount of electricity for lighting said premises, at all times, reserving the right, however, in case lessee in the judgment of lessor uses the electricity in an extravagant or unreasonable manner, of requiring lessee to put in meters and pay for the excess amount used, or in default thereof, to cut off the supply. In consideration of the fact that no extra charge is made for light, excepting as aforesaid, and for heat, lessor shall not be liable for any failure to supply either light or heat not due to gross negligence on its part.

(11) Lessor shall not be liable for any damages to any property at any time in said premises or building from water, rain, or snow which may leak into, issue, or flow from any part of said building, or from the pipes or plumbing works of the same, or from any other place or quarter.

(12) Lessee shall give to lessor prompt written notice of any accident to, or defects in, the water pipes, electric wires, or warming

apparatus, which will be remedied by lessor with due diligence, the cost, however, of replacing electric lamps broken by lessee or lessee's employees to be borne by said lessee. The lessor shall not be responsible for any injury or damage caused by the handling of electric lamps or wires.

(13) The lessor shall have the right, by its agents, to enter the premises at reasonable hours in the day or night to examine the same, or to run telegraph or other electric wires, or to make such repairs, additions, and alterations as it shall deem necessary for the safety, preservation, or restoration of the said building, or for the safety or convenience of the occupants thereof, and also to exhibit the said premises to be let and put up the usual notice, "To Let," which said notice shall not be removed or obliterated by any tenant during the three months previous to the expiration of the lease of the premises.

(14) No provision of this agreement shall be waived or altered except by writing, endorsed hereon or attached hereto and signed by the parties, and no officer or agent of the lessor shall have power or be deemed or held to have waived or altered any of said provisions unless such waivers or alterations are so endorsed or attached hereto.

In witness whereof, the parties hereto have interchangeably set their hands and seals the day and year first above written.

FARMERS DEPOSIT NATIONAL BANK. [SEAL.]
By A. E. DUNN.

Witness:
J. G. YOUNG. [SEAL.]

235 *Assignment of lease.*

Whereas on the 26th day of December, A. D. 1919, a certain building lease was made and entered into by and between Farmers Deposit National Bank, of Pittsburgh, Pa., lessor, and Quapaw Gas Company, lessee, covering the following office room, to wit:

Room 1320 on the 13th floor of the Farmers Deposit National Bank's Building, situate on the northeast corner of Fifth Avenue and Wood Street, in the second ward of the city of Pittsburgh, Pennsylvania.

Whereas the said lease and all rights thereunder or incident thereto are now owned by Quapaw Gas Company.

Now, therefore, for and in consideration of one dollar, and other valuable considerations, the receipts of which is hereby acknowledged, the undersigned, the present owner of the said building lease and all rights thereunder or incident thereto, do hereby bargain, sell, transfer, assign, and convey unto O. G. Richter all of its right, title and interest of the original lease and present owner in and to the said lease and rights thereunder in so far as it covers the above described premises.

In witness whereof, the undersigned owner and assignor has caused this instrument to be signed by its vice president, and attested and its seal affixed by its secretary, this the day of , A. D. 1920.

QUAPAW GAS COMPANY,
By R. C. RUSSUM,
Vice President.

Attest:
C. E. MURRAY,
Secretary.

236 404—5-21-Eg.

Citation.

WESTERN DISTRICT OF PENNSYLVANIA, *ss.*

To J. C. McDowell, greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court to be holden at the city of Washington, D. C., on the 29th day of Dec. next, pursuant to an appeal filed in the office of the Clerk of the District Court of the United States for the Western District of Pennsylvania, wherein Joseph A. Burdeau, is appellant, and you are are appellee, to show cause if any you know or have to say why the order of court or decree rendered against the said appellant, as in the said appeal appears, should not be duly reversed, and full and speedy justice done to the parties aforesaid in this behalf.

Witness my hand this 29th day of Nov. 1920.

CHAS. P. ORR, *Judge.*

Service of the above citation accepted this 29 day of Nov. 1920.
A. M. IMBRIE,
Atty. petition.

237

Certificate of exemplification.

In the District Court of the United States for the Western District of Pennsylvania.

No. 404. May Term, 1921. In Equity.

In re Application of J. C. McDowell, for return to him of certain books, papers, etc., now in possession of Joseph A. Burdeau, Sp. Ass't to the Atty. Gen'l of the U. S. et al.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, J. Wood Clark, clerk of the District Court of the United States, for the Western District of Pennsylvania, do hereby certify that the annexed and foregoing pages contain a true and correct copy of the record *sur* appeal in the above entitled case, so full and entire as the

same remains of record and on file in my office, in the city of Pittsburgh, in said district.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 8th day of Dec., A. D. 1920.

[SEAL.] J. WOOD CLARK, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, Chas. P. Orr, district judge of the United States, for said district, do hereby certify that J. Wood Clark, above named, was, at the time of making the above certificate, and is now, clerk of the said court, and that the said certificate made by him is in due form of law.

CHAS. P. ORR,
Pittsburgh, Dec. 8th., 1920. *U. S. District Judge.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, J. Wood Clark, clerk of the District Court, of the United States for the Western District of Pennsylvania, do certify that the Honorable Chas. P. Orr, by whom the foregoing attestation was made, and who has thereunto subscribed his name, was, at the time of making thereof, and still is, Judge of the District Court of the United States in and for said district, duly commissioned and qualified: to all whose acts, as such, full faith and credit are and ought to be given, as well in the courts of judicature as elsewhere.

In testimony wherefore, I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, in said district, this 8th day of Dec., A. D. 1920.

[SEAL.] J. WOOD CLARK, *Clerk.*

(Indorsement on cover:) File No. 28003. W. Pennsylvania D. C. U. S. Term N. 646. Joseph A. Burdeau, appellant, vs. J. C. McDowell. Filed December 14th, 1920. File No. 28003.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

JOSEPH A. BURDEAU, SPECIAL ASSISTANT TO the Attorney General, appellant,
v.
J. C. McDOWELL, APPELLEE.

No. 646.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

MOTION TO ADVANCE.

Comes now the Solicitor General, on behalf of the appellant in the above-entitled cause, and respectfully moves the court to advance this case and set it for hearing on February 28, 1921.

The appeal is from an order of the District Court, made on the petition of J. C. McDowell, appellee, directing the restoration and return to him of certain books and papers then in the custody and possession of Joseph A. Burdeau, a special assistant to the Attorney General, and constituting material evidence of a serious offense against the laws of the United States, which he

was about to use as evidence before the grand jury for the purpose of procuring the indictment of the said McDowell. These books and papers had been delivered to him by officers and auditors of a corporation of which McDowell was an employee and had been obtained by the former while they were engaged in investigating alleged frauds of the corporation by McDowell. No officer of the United States took part, instigated, or had knowledge of the taking of said books and papers, and they were not taken under process of any kind. Upon the evidence in the record, the Government insists that their possession was legally and properly acquired by the officers of the corporation, and, at any rate, their taking involved no violation of McDowell's constitutional rights.

The District Court ordered all of said books and papers, together with all copies, memoranda, and data of every nature whatsoever acquired, by the use of or through knowledge acquired from an inspection of the books and papers, to be delivered to the clerk of the court, who was directed to impound them for the period of ten days, and at the end of that period to deliver them to McDowell or his attorneys, unless an appeal should be taken within that period, and in that case the books, papers, etc., were ordered to be impounded until the determination of the appeal, McDowell and his attorneys, however, to have the right to inspect and make such memoranda and take such data

therefrom as they might desire. The order further enjoined appellant and the Department of Justice from presenting to any United States commissioner, grand jury, or any judicial tribunal any of said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data, or any copies of memoranda made therefrom, or any evidence of any nature whatsoever secured through or coming into their possession as the result of knowledge obtained by them from an inspection of said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data thereby directed to be impounded.

An appeal was promptly taken and, upon application to one of the Justices of this court, so much of the order was superseded as provided that at the end of a period of ten days the books and papers should be delivered to McDowell and as directed that after the period of ten days McDowell and his attorneys should have the right to inspect and make memoranda from said books and papers. And it was ordered that, pending the appeal, the clerk of the District Court should keep the papers and books impounded and should not permit or allow either party to inspect them.

These books and papers are therefore now in the custody of the clerk of the court. They constitute material evidence of a crime against the laws of the United States, and the Department of Justice is enjoined from using them before a grand jury

or for any other purpose in the prosecution of the offender. If this situation continues until the case is regularly reached on the docket of this court, the result will be that, in the meantime, the administration of the criminal law in this case will be suspended.

It is respectfully submitted, therefore, that the case should be advanced.

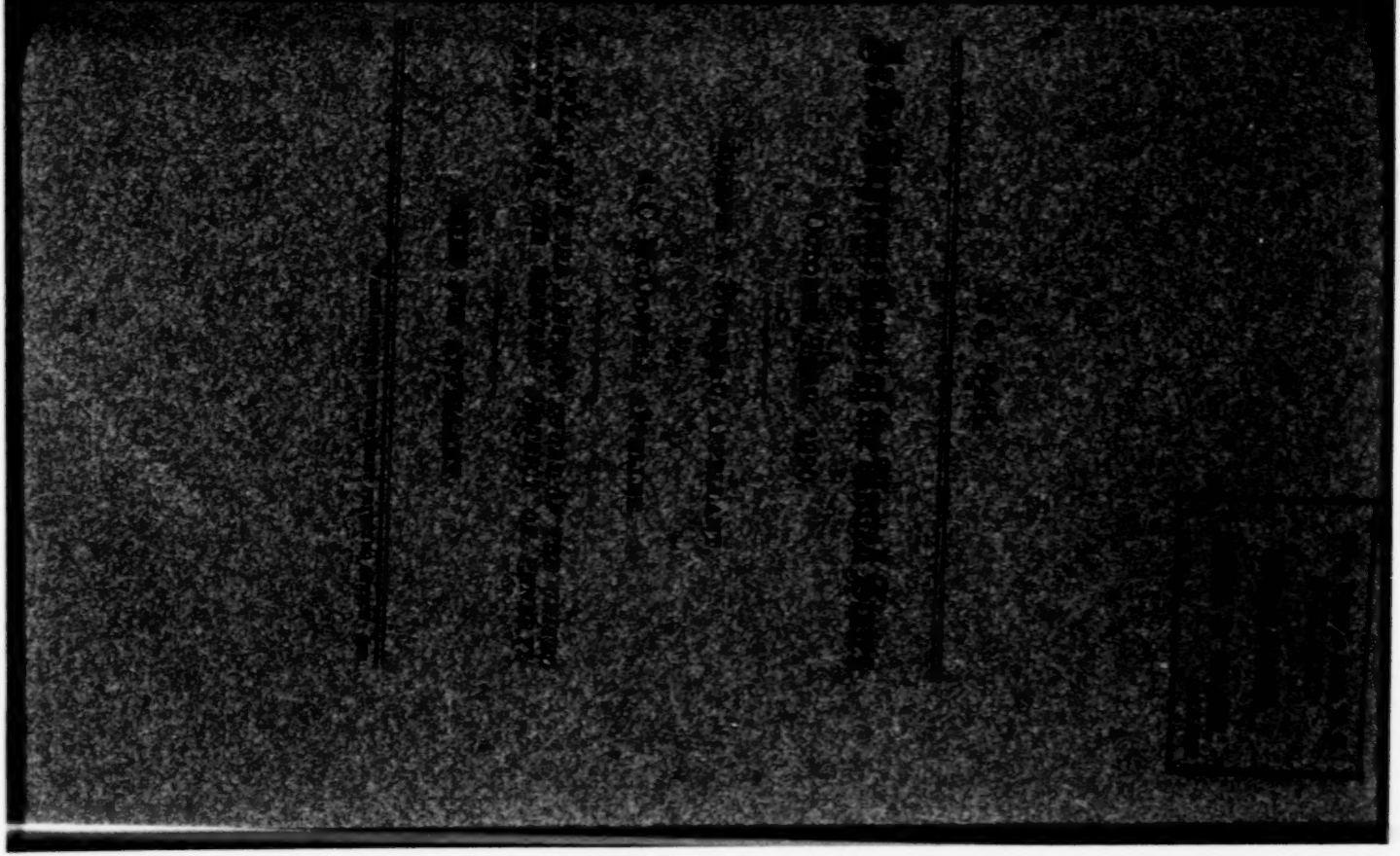
WILLIAM L. FRIERSON,
Solicitor General.

JANUARY, 1921.

○

APPELLANTS

BRIEF



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In the Supreme Court of the United States

OCTOBER TERM, 1920.

JOSEPH A. BURDEAU, APPELLANT,
v.
J. C. McDOWELL, APPELLEE.
No. 646.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR APPELLANT.

This case is here on appeal from an order of the District Court enjoining the Department of Justice from using certain books and papers before the grand jury and requiring them to be returned to appellee, upon the ground that before coming to the possession of the officers of the Department of Justice they had been stolen from the appellee.

THE PETITION IN THE COURT BELOW.

The appellee filed a petition in the District Court alleging that appellant, as a special assistant to the Attorney General, intended to submit to the grand jury "certain private books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data" which were the personal and private property of appellee. It was then alleged that these papers, books, letters, etc., were in the possession and

under the exclusive control of appellee in his offices in the Farmers Bank Building in Pittsburgh, and were during the spring and summer of 1920 unlawfully and feloniously seized and stolen from him by certain persons "participating in, furthering, and aiding the proposed investigation" "to be made by the said grand jury, under the direction and control of the said Joseph A. Burdeau, special assistant to the Attorney General," and that these persons purloined and stole the same, drilled the appellee's private safes and broke the locks on his private desk, and abstracted private papers from files in his office. It is then alleged that the letters, books, etc., so secured are in the custody and control of appellant, who has used them for the purpose of securing other evidence to aid in securing an indictment. (Record, pp. 5–7.)

It will be observed that there is no allegation that any Federal officer had any part in taking these papers and books, or even knew anything of the investigation that was being made at the time they were taken.

THE ANSWER.

The answer made the point that even if certain persons had unlawfully taken the books and papers in question, as alleged, the appellee would not be entitled to have them returned in this proceeding in the absence of a showing that they had been taken by the direction or under the authority of some officer of the Federal Government. The facts of the alleged taking were then set out fully and are substantially as follows:

The appellee was a director and employee of the Cities Service Company, a holding corporation, which owned and controlled various oil and gas and oil refining and pipe companies in various cities of the United States. He was also an officer of some of these subsidiary companies, and particularly he was a director and vice president of the Quapaw Gas Company, which had an office in room 1320, Farmers Bank Building, Pittsburgh, Pa. This room he occupied as the responsible officer of the Quapaw Gas Company, and that company leased the office and paid the rent. He himself rented the adjoining room, No. 1321, and occupied it as his private office. His connection with the Cities Service Company and its subsidiary companies had continued for a number of years. In the early part of 1920 evidence came to the Cities Service Company indicating that he, in conjunction with others, had been defrauding that company and its subsidiaries on a large scale by secretly receiving commissions on property sold to these companies.

One of the men, located at Buffalo, who had been operating with him made a full confession and then committed suicide. Becoming satisfied that appellee was guilty, the officers of the company confronted him with the facts and discharged him, and immediately directed a complete audit of the books of the company, for the purpose of ascertaining definitely the state of affairs. An auditor was sent to Pittsburgh with authority to take charge of the office of the Qua-

paw Gas Company, and representatives of the company were placed in room 1320, the company's office, to see that no papers or books were removed pending the arrival of the auditor. The investigation at that time was not with a view to discovering any violation of Federal statutes, but for the purpose of ascertaining to what extent McDowell had defrauded the company. When the auditor arrived he was armed with a letter from the president of the Quapaw Gas Company authorizing him to take possession of the office and any records, books, or papers, and to remove such as he desired in the performance of his duties as auditor. He found in charge of the office a Miss Melus, who was a salaried employee of the Quapaw Gas Company and also in the employ of McDowell personally. She requested that, before any papers or records were removed, she be allowed to consult with Mr. Imbrie, attorney for McDowell, and this request was granted. Mr. Imbrie came to the office and agreed that certain papers which the auditor could identify as relating to the company's business, but which were then in McDowell's private office, in room 1321, should be removed and placed in room 1320 for examination. At his request, Miss Melus was permitted to remain in room 1320 and take a list of or copies of such papers as might be removed from that room. In room 1320 she opened the desk used by McDowell and directed the building superintendent to open a large safe in the room.

There was also a small safe in the same room, which she stated was used for personal papers of

McDowell and that he alone had the combination and she could not give access to it. She remained in the room during the day while the auditor was making his examination and was advised that he would return and continue the examination that evening and that she might be present, if she desired. She inquired whether the large safe would be examined, and was asked what papers were in that safe. She stated that they were all private matters, having no connection whatever with the company, and that this safe, which she had previously directed to be opened, need not be examined. She did not return that evening, but the auditor continued his examination of the letter files, etc. When he began the examination of the large safe, it was found that there were many papers in it relating to the business of the company. Finding that he had been misinformed in this regard, the auditor attempted to have the small safe opened, but did not succeed. He left Pittsburgh that night, taking with him a few of the papers found in the office of the Quapaw Gas Company relating to the Cities Service Company and some of its subsidiaries. This was on March 24, 1920. On April 5, Mr. Imbrie, as attorney for McDowell, made a written demand to be allowed to remove the small safe and contents, stating that, while it was in room 1320, it was the private property of McDowell. He was informed that this would not be permitted without an opportunity to examine the contents, which McDowell had refused to allow, and that it was proposed to open the safe and examine

the contents in the presence of McDowell or his representative, if he so desired. In the meantime, on April 3d, Mr. Imbrie had been told that unless the safe was opened by McDowell by 9.30 a. m. on April 5th steps would be taken to open it. Mr. Imbrie asked for more time and was given until that afternoon at 2 o'clock.

At the latter hour he stated that McDowell's New York attorney would be in Pittsburgh on the following day and asked for further time. An effort was then made to open the safe, but without success. Arrangements were then made to have an expert open it the next morning in the presence of Mr. Imbrie or a disinterested third person. At the appointed time, however, it was found that persons representing McDowell had been to the office and opened the safe and that those present were Miss Melus, Mr. Imbrie, and some New York lawyer, the safe having been opened by Miss Melus and some papers taken out. After this the small safe was forcibly opened and found to contain only a penknife and a 10-cent piece. The desk in the company's office, room 1320, was again opened and certain papers removed therefrom, and other papers were taken from the files. Still later all papers contained in the files and desks in the company's office were removed. Some of the papers so obtained indicated a violation of section 215 of the Criminal Code. The matter, however, was not called to the attention of any Federal authorities until after June 11, 1920, when statements and reports were

made to the Department of Justice. The papers now in question, which had been taken not from McDowell's private files but from the office of the Quapaw Gas Company, were turned over some time after September 1st to a representative of the Department of Justice. (Rec., pp. 7–22.)

THE EVIDENCE.

The evidence introduced on the hearing substantially establishes the facts as set out in the answer, and these facts need not now be repeated in detail (Rec., pp. 23–98). To summarize, it appears that McDowell was an officer of the Quapaw Gas Company, and presumably was also engaged in other business. He occupied, as offices, two adjoining and connecting rooms, Nos. 1320–1321. He personally rented and paid the rent for No. 1321. The company leased and paid the rent for No. 1320 as an office for the transaction of its business, he being in charge as its representative. His secretary was paid a salary by the company and an additional salary by him. He occupied No. 1320 and his secretary No. 1321. Papers relating to the company's business were kept in both rooms, and this was also true of papers relating to his own affairs.

The company learned that he had been crooked, discharged him, and took possession, through its representatives, of room 1320 (the one it had leased for an office). It made no effort to take possession of No. 1321, nor is it claimed that anything was taken from that room except some files which

McDowell's secretary turned over as belonging to the company, and which were then transferred to room 1320.

Having thus taken possession of its own office, it began an investigation of its affairs as they had been conducted by McDowell in No. 1320. There were a desk, some filing cases, a large safe, and a small safe in that room. McDowell's secretary opened the desk and caused the large safe to be opened, but claimed that she did not have the combination to the small safe, which, she asserted, contained nothing but McDowell's private papers. The company's representatives then proceeded to go through the books and papers in room 1320, taking out such as were deemed necessary for a complete audit. The secretary was allowed to be present as long as she desired and to make a list of papers taken. The small safe was not opened for some days, and then it was found that McDowell's representative had gained access and removed all its contents, except a penknife and a dime. Later the company assigned its lease and gave up room 1320, and subsequently removed the contents, including books and papers which had not been previously removed. The secretary testified that all the furnishings in the room except the large safe, which belonged to the building, were the private property of McDowell, but the right to regain possession of these is, of course, not involved in this case. Among the papers found in the company's office when it took possession were some which furnished evidence that McDowell had been guilty of a

fraudulent use of the mails. These were finally turned over to Burdeau, as a representative of the Department of Justice.

It does not appear of what these papers consisted. McDowell did not testify. His secretary gave no description of any papers which were taken from the office beyond making a claim that some of them were private papers belonging to McDowell and not relating to the company's business. The representatives of the company who took the papers were introduced by appellee as witnesses, but were not asked about a single paper or book claimed to belong to McDowell. There was no claim that *all* the papers taken from the office were turned over to the representative of the Department of Justice. It was admitted that many of the papers so taken were the property of the company and related to its business. It appeared, therefore, that *some* of the papers removed from the office by the representatives of the company were the property of the company, while others belonged to McDowell, though no description was given of any paper of either class. Burdeau was present in court, but was not called on for a list of the papers which had been delivered to him and no witness described a single paper which was in his possession. It does not appear, therefore, whether any of the books or papers which were thought to furnish evidence that he had committed an offense against the laws of the United States was one of the books or papers which he claims as his private property. Although these books and papers were in the possession of the com-

pany from March until September before being turned over to representatives of the Government, it does not appear that he took steps during that time to regain possession of any of them.

RULING OF THE COURT BELOW.

The district judge, after hearing the evidence, held that the papers, books, etc., had been stolen from McDowell and ordered them to be returned to him, together with any memoranda made therefrom, and also enjoined the Department of Justice from using these papers or evidence obtained from them before the grand jury. In his opinion, however, he makes this statement:

> It is proper to state that, so far as appears in this proceeding, neither the said Joseph A. Burdeau nor any other officer or agent of the United States, or any of the departments, had anything to do with the search of the petitioner's safes, files and desk, or the abstraction therefrom of any of the writings referred to in the petition, and the order made in this case is not made because of any unlawful act on the part of anybody representing the United States or any of its departments but solely upon the ground that the Government should not use stolen property for any purpose after demand for its return.

CONTENTIONS OF APPELLANT.

For the appellant it is contended:

(1) The representatives of the company by which McDowell was employed and which he represented, committed no wrong when, after discharging him,

they took possession of the company's own office and the books and papers kept therein. The things of which they thus obtained possession can not, in any proper sense, be said to have been stolen from McDowell.

(2) It is not claimed that the books and papers in question have any money value. They are valuable only for evidentiary purposes. If they had been wrongly taken by representatives of the company in the course of an investigation of the company's affairs in which no Government official participated, or of which no such official had knowledge, no constitutional right of appellee would be violated if they should thereafter be retained and used by Government officials in a prosecution for a criminal offense.

BRIEF.

I.

It was not shown that any book, paper, or other document which was the private property of McDowell was delivered to or was ever in the possession of appellant.

The petition for the return of these papers makes no reference to the fact that McDowell was an officer of the company and in charge of one of its offices. It does not describe the papers beyond referring to them as "certain private books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data which are the personal and private property of your petitioner," and which, it is alleged, Burdeau is about to use as evidence before the grand jury. It is alleged that these books, papers, etc.,

"were in the possession and under the exclusive control of your petitioner, in his offices in the Farmers Bank Building, in the city of Pittsburgh," and were, during the spring and summer of 1920, stolen from him by certain persons, and that "all of said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data are now in the possession and under the control of the said Joseph A. Burdeau, special assistant Attorney General, and his assistants."

The theory thus presented was that the private property of McDowell had been stolen from *his own* office. If the facts had supported this theory, it would have been perhaps unnecessary to specifically describe the papers the return of which was sought. If *all* of the papers were his and if they had been taken from him under circumstances which authorized the court, in a proceeding of this kind, to order them returned, it would have been sufficient to have ordered in general terms the return of *all* the papers, books, etc., taken from his office at the time mentioned. Accordingly the order that was actually entered was that—

> all of said books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data so as aforesaid stolen from the offices of J. C. McDowell at No. 1320 and 1321 Farmers Bank Building and delivered by Henry L. Doherty & Company and the said Cities Service Company, its officers, agents, attorneys, and employees, and the Quapaw Gas Company, its officers, agents, attorneys,

> and employees, or either of them, to the said Joseph A. Burdeau, or the Department of Justice, or any of its agents, officers, and employees, or the Post Office Department of the United States, their agents, officers, and employees, together with all copies, memoranda and data of every nature whatsoever acquired, taken from, or coming into the possession of them, or any of them, through, by the use of, or through knowledge acquired from an inspection of the said books, memoranda, letters, copies of letters, correspondence, diaries, and other data so as aforesaid stolen from the offices of said J. C. McDowell at rooms 1320 and 1321, Farmers Bank Building, in the city of Pittsburgh—

be delivered to the clerk of the court and held by him for ten days, and be delivered at the end of that time to McDowell or his attorneys, unless an appeal should be taken in the meantime.

This order could be justified only upon the theory stated in the petition—that is, that *all* the papers, books, etc., removed from the office were the private property of McDowell, of which he was entitled to the exclusive possession and control. The evidence, however, made a very different case. McDowell was never entitled to the exclusive possession and control of all of these papers. Room 1320, from which they were taken, was the office *of the company* whose representative he was. The company leased and paid the rent for the office and he occupied it as its representative. So far as he had possession of the books, etc., relating to the company's busi-

ness, he held possession not for himself but for the company. When he was discharged the company was entitled to the possession of its offices and of all books, papers, etc., connected with its business. So far as possession was taken of these, the act was rightful and lawful. It may be that commingled with the company's property of this kind were books and papers belonging to him. But what belonged to him and what belonged to the company could be determined only by an examination of what was found in the office.

In determining this question the company had equal, if not superior, rights to his. It may be assumed that when all of the papers, books, etc., were removed from the office those removed included some of his private papers. In this situation, before he would be entitled to relief, in any event, against an officer of the United States charged with the prosecution of crime upon the ground that that officer was about to use books and papers which he was entitled to have returned to him, it would be incumbent upon him to show what private papers of his that officer had. It appears, however, that all the papers removed by the company were not delivered to the officers of the Government. Several bushels of papers and books were removed, but the only ones which came to the possession of Burdeau were certain papers and documents which it was supposed tended to show a fraudulent use of the mails by McDowell. There is no evidence whatever of the nature of these documents. It is not even

shown in the evidence that they included what the petition mentions as diaries. Nor is anything disclosed, either in the petition or the evidence, as to what kind of diaries were kept. For aught that appears, they may have been merely diaries showing the business transactions conducted by McDowell as the representative of the company. If so, they contained a record of the company's own business transactions, and it was clearly entitled to the possession of them. It is admitted that many of the papers, books, etc., removed from the office belonged to the company. If the incriminating evidence was found among these papers, the right to use them was clear.

In other words, giving the fullest effect to all the testimony offered, the most that can be said is that the company took possession of two classes of papers, those belonging to it and those belonging to McDowell. From the mass of papers so taken, a certain number of them were delivered to Burdeau, but the record is entirely silent as to whether these latter came from the one class or the other. If they came from the papers which belonged to the company, they were rightfully taken. It can not possibly be said that Burdeau has possession of any paper wrongfully taken from McDowell, unless it appears that that paper was one which belonged to him. This the record utterly fails to show. If the papers which were about to be used before the grand jury were McDowell's private papers, and not the papers of the company, it would have been easy to show that fact.

Burdeau, who was in court, could have been called upon to produce the papers in his possession, and from these and the evidence introduced the court could have determined which, if any of them, had been wrongfully taken from McDowell. In the absence of proof of this kind, however, the court can not possibly know whether the papers actually ordered to be returned belonged to McDowell or to the company. The order as entered assumes that *all* of the papers removed belonged to McDowell, and hence ordered all of them which were in the possession of Burdeau or his assistants to be returned. It is admitted, however, that many of the papers which the company found in its office and removed belonged to it, and, for aught that the record shows, every paper delivered to Burdeau may have been one of this class. The order as entered is, therefore, clearly without support in the record and should be reversed.

II.

The books and papers in question were not stolen.

It is difficult to see how it can be said, with any show of reason, that there was any stealing of books and papers in this case. Certainly, there was no invasion of McDowell's right of privacy. Everything that was taken into possession was found in the office of the company itself, with the exception of a few papers which were in the private office of McDowell, but which it is admitted related to the business of the company, and were, therefore, such papers as the company was entitled to have delivered to it. They

were, in fact, delivered to the auditor by McDowell's representative.

What are the rights of a company when it finds that an employee, for many years in charge of one of its offices, has been crooked? It certainly has the right to discharge him and take possession of the office. If he has mixed his private papers with the papers of the company, must the crooked employee be permitted to first go through all the files of the office and remove such papers as he chooses to regard as his private papers? or is the company entitled to inspect all such papers and have a voice in determining whether they relate to matters of interest to the company?

If the employee has left papers of his own commingled with those of the company, he certainly can not be said to be the sole judge of whether a particular paper is his or belongs to the company. He has brought about a condition under which the company has the right to inspect everything in the office before allowing anything to be removed. The inspection, therefore, is entirely lawful, and any information of crime or other matters which may be thus acquired is lawfully acquired and may properly be used. In the present case, McDowell's representative was allowed to be present and make a list or take copies of all papers examined. A paper furnishing evidence of crookedness in the conduct of the company's affairs certainly relates to a matter in which the company is interested; and if the unfaithful employee has left it in the company's

files, or in the company's office, there is no principle of law under which he can lawfully claim the right to have it returned to him. He has parted with the private possession of it, and his surrender of possession has not been brought about by any invasion of his constitutional rights.

No papers were removed from the small safe. Every effort was made to have it opened in the presence of McDowell or his representative in order to ascertain whether its contents consisted entirely of private papers belonging to McDowell. It is true this safe was finally broken open; but it was then discovered that, notwithstanding the precautions taken by representatives of the company, McDowell's representative had secured access to it, opened it, and removed all its contents except a penknife and a dime. The other papers were found in desks, files, and a safe in the office of the company itself. It is submitted that a company investigating its own office, for the purpose of discovering the unfaithfulness of its employee in charge, commits neither legal nor moral wrong when it takes possession of any papers or books found in the office relating to a matter in which it is interested, even though that be a matter for which the crooked employee may be prosecuted criminally.

III.

Even if it could be said that the company or its representatives stole these papers from the appellee, this would not preclude their use in evidence if they should thereafter come to the hands of the Federal authorities.

The district judge placed his decision entirely upon the proposition that these papers should not be used because they had been stolen by the company from McDowell. We think he was clearly in error in holding that they were stolen. But if he was right in that holding, it does not by any means follow that they can not properly be used as evidence against McDowell in a criminal prosecution. The court found, as the evidence clearly required, that no department of the Federal Government had anything whatever to do with the taking of these papers and that no Federal official had any knowledge that an investigation of any kind was being made, nor did such knowledge come to any Federal official until several months later. It would scarcely be insisted by any one that, if the Government should discover that some one has stolen from another a paper which shows that the latter has committed a crime, the thief could not be called as a witness to testify to what he has discovered. If the paper was still in his possession, he could be subpœnaed to attend and produce the paper. The same thing is accomplished when the Government, instead of issuing a subpœna duces tecum, takes the paper and holds it as evidence. The rightful owner, while it is being so held, is no more entitled to its return than one who has been arrested for carrying a

pistol is entitled to have the pistol returned to him pending a trial.

It must always be remembered that "a party is privileged from producing the evidence but not from its production." *Johnson* v. *United States*, 228 U. S. 457, 458. It may be added that the Constitution protects him against governmental invasion of his privacy for the purpose of securing evidence against him but not against the use by the Government of evidence which has come to its knowledge through a private party although that party, for his own purposes, may have resorted to means to secure it which, if employed by the Government, would have infringed constitutional rights. If the Government can get possession of evidence in any way without requiring the defendant himself to produce it, such evidence may properly be used without violating the defendant's constitutional right not to be required to give evidence against himself.

Moreover, the fourth amendment protects only against searches and seizures which are made under governmental authority, real or assumed, or under color of such authority. If papers have been seized, even though wrongfully, by one not acting under color of authority, and they afterwards come to the possession of the Government, they may be properly used in evidence. This has been expressly held by this court in a case where they were actually seized by police officers, who may be assumed to have been acting under State authority. In *Weeks* v. *United States*, 232 U. S. 383, the court ordered the return of

certain papers which had been seized by authority of Federal officials. In the same case, however, there were involved papers which had been seized by policemen and turned over to Federal authorities. As to these, the court said, at page 398:

> As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the Federal court, under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the fourth amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies.

Much less can it be said that the fourth amendment is directed to individual misconduct of persons occupying no official position at all. In the *Weeks* case the Government had possession of papers which local officers had seized and turned over to Federal authorities. The court said that there had been no invasion of rights under the fourth amendment and refused to order the papers returned. Here, we have, at most, papers taken by private individuals and, some months later, turned over to the Federal authorities. Certainly, there can be no basis for requiring them to be returned while the Government is retaining them for use as evidence.

An examination of the cases decided by this court makes it plain that the District Court is without power to interfere with the use by Federal prosecuting officers of evidence in their possession and received by them from individuals, no matter how wrongful the conduct of such individuals may have been in obtaining it in the first instance. These cases have been so recently reviewed in the Government's brief in *Felix Gouled* v. *United States*, No. 250 at the present term, that it is not deemed necessary to now do more than cite them:

Boyd v. *United States*, 116 U. S. 616.
Adams v. *New York*, 192 U. S. 585.
Weeks v. *United States*, 232 U. S. 383.
Johnson v. *United States*, 228 U. S. 457.
Perlman v. *United States*, 247 U. S. 7.

It is respectfully submitted that the judgment of the District Court is clearly erroneous and should be reversed.

WILLIAM L. FRIERSON,
Solicitor General.

FEBRUARY, 1921.

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In the Supreme Court of the United States

OCTOBER TERM, 1920.

JOSEPH A. BURDEAU, APPELLANT,
v.
J. C. McDOWELL.

No. 646.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

BRIEF ON BEHALF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS APPEAL.

The above motion is based on the claim that the order of the district court (R. 3, 4) that the appellant, a special assistant to the Attorney General, the Department of Justice, its officers and agents, the Post Office Department, its inspectors and agents, deliver to the clerk of the court books, papers, memoranda, letters, copies of letters, correspondence, diaries, and other data, the personal property of the appellee, J. C. McDowell, and that the appellant, and the Department of Justice, its officers and agents, be enjoined from presenting said books, etc., or any evidence secured through or by means of them, to any United States commissioner, grand jury, or judicial tribunal, is not one reviewable by this court on direct appeal as permitted by section 238, Judicial Code. It is argued that only two grounds for such

a direct appeal can possibly be claimed to exist on this record, viz, the jurisdiction of the district court and the application of the Constitution of the United States, but that neither of these questions is really raised in any substantial sense on the record.

Since the appellant does not claim that the jurisdiction of the district court was in issue, that question may be ignored, leaving only the question whether or not the case, as made in the district court, involved the construction or application of the Constitution of the United States, and specifically of articles 4 and 5 of the amendments.

The argument of appellees on this motion is preceded by a so-called "statement of facts" which, without citing a single page of the record, gives such an erroneous impression of the case presented to the district court as to require, not merely a general denial of its correctness, but also a statement of what that case actually was.

The proceedings were begun by a petition of the appellee, McDowell (R. 5–7), from which it appeared that no proceedings of any sort whatsoever relating in any way to its subject matter were pending in the United States District Court for the Western District of Pennsylvania. The only allegation bearing on the matter was that it was the intent of the Department of Justice to present to the grand jury then sitting in the Western District of Pennsylvania for investigation an alleged violation by McDowell of the criminal laws of the United States, and to present to

said grand jury for that purpose certain books, etc., which were the personal and private property of McDowell.

It is clear that this allegation was not, *of itself*, sufficient to confer jurisdiction of McDowell's petition on the United States District Court for the Western District of Pennsylvania. Even if the allegation had been that the matter was actually before the grand jury, instead of being, as it was, that there was an "intent and purpose" to present it to the grand jury, the district court would have had no jurisdiction of the petition *on that ground alone*. In the well-known case of *Commonwealth* v. *Knapp*, for the murder of Capt. White (9 Pick. 495; 7 Am. St. Trs. 410), it was held that the court would not make an order as to what testimony should be presented to the grand jury. In spite of the remarks of counsel for Knapp in that case, there is nothing to show that Chief Justice Marshall adopted any different view in *Burr's Case* (*Burr's Trial*, Robertson ed., pp. 172–175). In *Post* v. *United States*, 161 U. S. 583, 587, it was said:

> Criminal proceedings can not be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at the least, by complaint before a magistrate. *Virginia* v. *Paul*, 148 U. S. 107, 119, 121; *Rex* v. *Phillips*, Russ. & Ry. 369; *Regina* v. *Parker*, Leigh & Cave, 459; *S. C.* 9 Cox Crim. Cas. 475. The submission of a

> bill of indictment by the attorney for the Government to the grand jury, and the examination of witnesses before them, are both in secret, and are no part of the criminal proceedings against the accused, but are merely to assist the grand jury in determining whether such proceedings shall be commenced; the grand jury may ignore the bill, and decline to find any indictment; and it can not be known whether any proceedings will be instituted against the accused until an indictment against him is presented in open court.

The decision of this court in *United States* v. *Thompson*, 251 U. S. 407 (where a ruling of the same district judge who made the order in the present case was involved), leads to the conclusion that the district court had no jurisdiction over such a petition as that presented to it in the case at bar *merely* because there was an allegation of intent on the part of officers or agents of the Department of Justice to use at some future time improper evidence before a grand jury.

The jurisdiction of the district court in respect of this petition could not be sustained on the allegations that the appellant is or was a special assistant to the Attorney General, or that the books, etc., were in the possession of officers and agents of the Department of Justice or of the Post Office Department in their official capacity. Such an allegation did not make any of these persons officers of the district court or subject to its orders, and this was so whether they happened to be within reach of the process of that court or not. They, in their official capacity, were

no more subject to the order of the district court *because of that official capacity* than would have been the Attorney General or the Postmaster General.

It was evident, therefore, to the petitioner that the petition could not safely rest on the official character of the persons alleged to be in possession of the books, etc., nor on their alleged intent to present such books, etc., to the grand jury. Consequently, an attempt was made to allege, not merely an unlawful, but also an unconstitutional seizure of them. It was alleged (R. 5) that the books, etc., were in the possession of the petitioner as his *private* property in *his* offices in the Farmers Bank Building, Pittsburgh, that during the spring and summer of 1920 they were unlawfully and feloniously seized, purloined, and stolen from him, that they were then in the possession of appellant and his agents, and that in their unlawful seizure the petitioner's *private* safes, desk, and files had been broken into.

It was then expressly alleged (R. 6) that the possession by appellant of said books, etc., was "in violation of the legal and *constitutional* rights of your petitioner," and that the presentation to the grand jury of said books, etc., or of evidence based on them would be "a deprivation of your petitioner's constitutional rights, granted to him by the fourth and fifth amendments of the Constitution of the United States."

Thus the petitioner's case before the district court was clearly and specifically based, not merely on the

possibility of a grand jury investigation or on the official character of the appellant, which would not, *of themselves*, have been sufficient, but on the allegation that the possession and use of the books, etc., by the appellant in his official character for the purposes alleged involved the construction and application to the facts alleged in the petition of the fourth and fifth amendments to the Constitution, and therefore brought such possession and use within the jurisdiction and control of the United States District Court for the Western District of Pennsylvania.

Manifestly the mere allegation that the books, etc., had been stolen from the petitioner, either by the appellant or other agent of the United States, or by private individuals who had delivered them to the appellant or such other agents, would not have given a United States court jurisdiction of the matter. If, in fact, there was a theft, the criminal courts of the State of Pennsylvania were open for its prosecution, and, in so far as the petitioner's property rights were concerned, an action of replevin or trover in the State courts was his proper remedy.

Hence in no aspect of the case made by the petition does there appear, on analysis, any basis for jurisdiction in the United States district court, if the allegation as to the application to the case of the fourth and fifth amendments to the Constitution of the United States be omitted.

The answer of appellant to the petition and the facts developed at the trial are fully stated in the

main brief on behalf of appellant to which reference is made.

The record, looked at as a whole, in the case at bar fails to show any larceny or theft of the books, etc., referred to in the petition, or that they were the private books, etc., of the petitioner, but, on the contrary, shows affirmatively that the books, etc., were taken from the office of a corporation where its records were presumably kept, under a claim of right to them as relating to its business transacted by its officer. The only possible question before the district court, therefore, was whether or not the case was one, like *Wilson* v. *United States*, 221 U. S. 361, where the fourth and fifth amendments to the Constitution of the United States did not contain anything to prevent the use of such books by the United States, under the circumstances of the delivery of them to it, in the prosecution of McDowell for violation of the criminal laws of the United States.

The rulings of the district judge were to the effect that for the Government to use evidence which he called stolen would be a violation of McDowell's constitutional rights under the fourth and fifth amendments. After the testimony was in, he said (R. 101):

> I have indicated to you that there has been a gross violation of the fourth and fifth amendments of the Constitution. I do not think that the Government has been a party to any illegal seizure. Now, the fourth and fifth amendments, as I understand, were passed for

> the benefit of the States against the action by the United States forbidden by those amendments. The question before the court is this: There are papers which I am satisfied were illegally and wrongfully taken from the petitioner's possession—private papers—and they are now in the hands of the Government.

Later he stated that he placed the case on the broad ground that the Government ought not to use papers which have been stolen (R. 102), but he immediately added the following (R. 102):

> Should this court ratify and approve the proceedings that have taken place in this case, there would be no necessity for a consideration of the valuable protection accorded by the fourth and fifth amendments of the Constitution, because anybody could proceed to rifle private papers and turn them over to the Government, and the Government could escape the consequences.

This analysis of the pleadings, evidence, and rulings in the case before the district court shows conclusively that it was one which involved the Constitution and application of the Constitution of the United States and brings it directly within the ruling in *Perlman* v. *United States*, 247 U. S. 7. In that case, as in the present, a petition was filed to enjoin the United States attorney from using before a grand jury, in investigating a charge of perjury against Perlman, certain papers claimed to be Perlman's private property. The petition was denied and a direct appeal was taken to this court under section

238, Judicial Code, on the ground that the Constitution was involved. The jurisdiction of this court was sustained over objection, and the application to the case of the fourth and fifth amendments was considered. Perlman, like McDowell, insisted on his rights of private property, as to which the following significant remarks were made (247 U. S. 15):

> But Perlman insists that he owned the exhibits and appears to contend that his ownership exempted them from any use by the Government without his consent. The extent of the insistence is rather elusive of measurement. It seems to be that the owner of property must be considered as having a constructive possession of it wherever it be and in whosesoever hands it be, and it is always, therefore, in a kind of asylum of constitutional privilege. And to be of avail the contention must be pushed to this extreme. It is opposed, however, by all the cited cases. They, as we have said, make the criterion of immunity not the ownership of property but the "physical or moral compulsion" exerted.

Similar questions were considered on direct writ of error in *Johnson's Case*, 228 U. S. 457.

Reference may also be made to *Silverthorne Lumber Company* v. *United States*, 251 U. S. 385, and *Amos* v. *United States*, decided February 28 last, in both of which cases jurisdiction was assumed on direct writ of error or appeal. It is true that in both these cases the original taking had been by agents of the United States, instead of by private

individuals as in the case at bar, but it is not perceived what difference that can make regarding the question whether the construction or application of the Constitution was involved in the case or not.

The motion should be overruled.

W. L. FRIERSON,
Solicitor General.
W. C. HERRON,
Attorney.

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IN THE

Supreme Court of the United States

NO. 646 OCTOBER TERM, 1920.

JOSEPH A. BURDEAU, Appellant,

vs.

J. C. McDOWELL, Appellee.

On Appeal From the District Court of the United States for the Western District of Pennsylvania.

Correction of the Record.

One of the significant incidents in this case has been the insistent attempt of the appellant to create an unwarranted prejudice against the appellee by injecting into the record at every opportunity incompetent and immaterial matter, the incompetency and immateriality of which precluded the appellee from effectually answering and denying the same. In his answer he dwells at length upon an alleged confession of one F. M. Lowry and attaches the so-called confession as an exhibit. In the Court below the appellee offered to prove the falsity of the statements therein contained but was prevented by the Court which held that the offer was irrelevant, immaterial and inadmissible. Notwithstanding this fact the appellant once more injected this so-called confession into his petition for a supersedeas in this Court for the purpose of creating prejudice against the appellee. When the record in the Court below was tran-

scribed it was discovered that for some mysterious reason appellee's offer and the ruling of the Court had been omitted. By agreement of the parties and by direction of the Court below the record was amended by inserting an additional page, to wit, page 114½ into the transcript.

In the printed record in this court this page 114½ is again omitted. In view of the repeated use made of and unwarranted emphasis given to this alleged confession, reference thereto having even been made in the appellant's brief, we deem its omission prejudicial to the appellee and ask that this page of the original transcript be treated as a part of the record in the case as though fully set forth therein.

After conference with the Solicitor General on this subject he has agreed that this missing page shall be printed in this brief and shall be treated as a part of the record in the case. The missing page properly belongs in the Record at the conclusion of the testimony of Frank B. Barnard at the foot of page 78 and is as follows:

"By Mr. Imbrie:

> We desire to call the attention of the Court to Exhibit "A" attached to the answer of Joseph A. Burdeau, the respondent, which purports to be a letter written by one F. M. Lowry, now deceased, and also to the references made to that letter in the answer itself and in the affidavit of William B. S. Winans attached to and made a part of said answer. This alleged letter certainly has no proper place either in the answer or in this proceeding, but inasmuch as it has been injected into the record

for the improper purpose of reflecting on and in some manner prejudicing the petitioner we offer to prove by F. B. Barnard, the witness on the stand and the same person who is referred to by that name in the letter in question, that the statement relating to the payment of anything by him to McDowell, the petitioner, is absolutely and unqualifiedly false and untrue.

By the Court:

The truth or falsity of the charges against the petitioner and the truth of the statements contained in the letter referred to are not an issue in this proceeding, and therefore the offer is irrelevant and immaterial and inadmissible.

By Mr. Imbrie:

Without taking issue with the Court's ruling, but for the sole purpose of completing the record we desire to advise the Court that we have present as a witness Mr. George W. McMullin, who is the only other person referred to in said F. M. Lowry letter, and we offer to prove by him that the statements contained in that letter and referred to in the answer and in the Winans' affidavit, which is made a part of the answer, are absolutely false and untrue.

By the Court:

Under the issue in this proceeding this evidence is not admissible.

Brief for Appellee.

The uncontradicted testimony establishes and the Court below found that a great quantity of private books and papers and furniture belonging to J. C. McDowell, the appellee, were seized and appropriated by Henry L. Doherty & Company and their employees. The Court finds they were stolen. The brief of appellant denies that they were stolen but in substance and effect declares that they came legally into the temporary possession of Henry L. Doherty and Company as bailees, and that the larceny was that of a bailee and not theft by a trespasser. It is not disputed, however, that possession of a considerable portion of the papers was secured by Henry L. Doherty and Company by drilling two safes and jimmying a roll top desk, and that this was done after opportunity had been given to them to inspect and remove any papers not the private and personal papers of McDowell. In addition private papers filed in filing cabinets were taken at the same time.

It was admitted by the appellant that many of these papers which had been unlawfully appropriated or stolen by Henry L. Doherty and Company were in his possession. He was a receiver of the stolen property. It was at no time denied by the appellant that part of the papers so as aforesaid in his possession were the private papers of the appellee, and at no time during the trial in the Court below did he allege that any of said papers were other than private papers of McDowell,

and the appellee in his petition asked only for the return of his private papers. If any of the papers in appellant's possession were other than private papers they would have been promply eliminated from the proceeding by the Court, with the consent of the petitioner. Appellant was asked to submit them to the Court and he declined (R. 81).

The confusion which has now been injected into the case on the question as to whether or not all of these papers were the private papers of the appellee is the direct result of the erroneous theory upon which the appellant defended the proceeding in the Court below. He defended solely on the theory that if he could show that the actual theft of the papers had not been committed by a government officer or agent the petitioner would thereby be deprived of his legal and equitable right to recover his property, and accordingly he permitted the petitioner and the Court to assume that all of the papers in his possession were of the kind mentioned in the petition, to wit, "personal and private books, papers, memoranda, letters, copies of letters, correspondence, diaries and other data." His theory of the case is shown in his remarks to the Court after the Court had signified the disposition which it intended to make of the case. He said: "May I slightly emphasize the position of myself as a representative of the Government. The Government, of course, had no knowledge of these things at the time they took place. The Government obtained physical possession of these papers from a person claiming to have a right to them. The Government has no interest in the papers as such. * * *

There is certainly no privity between the Department of Justice and the petitioner here. They came to us peaceably from a third person. Now, those papers will be subdivided into different classes. It may be that when the papers are exhibited to Your Honor you will say that some of them are private papers of J. C. McDowell. Now, whether they are or not is no concern of the Government, * * *." (R. 101.)

In other words it was a matter of no consequence to the appellant whether he was the recipient of stolen goods belonging to McDowell or the rightful custodian of the property of Henry L. Doherty and Company. He refused to recognize that McDowell had a legal right in an equitable proceeding to recover his personal and private property when that property was of such a nature that damages at law could not adequately compensate him.

Reply to Appellant's Brief.

The appellant in his brief advances three propositions. The mere recital of these propositions vindicates the contention of the appellee in his motion to dismiss for want of jurisdiction on the ground that no constitutional question is involved. These propositions are to the effect that the Court below is in error:

1. In holding that the papers in question were the private property of McDowell (Appellants Brief, p. 11).

2. In finding that the papers in question had been stolen (Appellants Brief, p. 16), and

3. In denying the title of the government to stolen private papers against their owner after timely proceeding had been had for their recovery. (Appellants Brief, p. 19.)

The brief of the appellant in this case is an astounding perversion of fact and a studied effort to create prejudice against the appellee by the injection of immaterial and unsupported allegations.

His first assertion is that "it was not shown that any book, paper or other document which was the private property of McDowell was delivered to or was ever in the possession of appellant." The attention of the Court is invited to the uncontradicted proof in the case. Miss Melus, petitioner's private secretary, testified that Winans, one of the principals in the theft, insisted on taking McDowell's personal papers (R. 48); that she was entirely excluded from the room where the papers were (R. 47, 50); that all papers in the large safe and the roll top desk were the private papers of McDowell, and that she submitted them to Winans for inspection after which they were relocked (R. 48-49); that all of the furniture, including roll top desk and filing cabinets which contained the papers in question were McDowell's personal property (R. 46, 50); that Room 1320, although the lease was in the name of the Quapaw Gas, Company, was not used by that company after 1915 but was rented by them for the use of Mr. McDowell (R. 46, 54); that the papers stolen included private

papers that had accumulated from almost the time that Mr. McDowell started in business (R. 56). It was admitted by Winans, one of the principals in the theft, that Mr. McDowell's name alone appeared on both office doors (R. 25); that he had jimmied and opened Mr. McDowell's private roll top desk and removed the contents (R. 26, 89). He denied his ability to describe any of the papers which he took from McDowell's office (R. 29) when he was afforded an opportunity by McDowell's attorneys to establish the true character of the papers taken by him and at the time within his reach if he alleged them to be other than private in their nature. The testimony of Krull, one of the detectives who guarded the office which contained the papers, established that both safes were drilled by the use of gas by men sent from New York (R. 67), and that the large safe contained among other things bonds, stocks and insurance policies that were the private property of Mr. McDowell, and that when he undertook to list the papers which the safe breakers removed they refused to permit it and destroyed the list which he started to make (R. 68, 70).

The appellant himself admitted the possession of a letter which its writer testified was a private letter to Mr. McDowell that had been taken from McDowell's desk (R. 75, 76). It was not contradicted by the appellant that private papers were taken by the persons who looted the petitioner's office, and the answer filed to the petitioner admits that some of the papers taken were in his possession and under his control (R. 10). The only question raised was as to whether Room 1320 was the office of McDowell who used it and whose name ap-

peared on the door, or of the Quapaw Gas Company that paid the rent. It is contended by the appellee that the location of private and personal papers does not control their legal title any more than it can determine the ownership and title of the furniture which is admittedly the property of the appellee and which was stolen by the same persons that stole the papers in question. The appellant had possession of these papers at the time the case was tried and had they not been the private papers of the petitioner he could readily have established it.

The appellant during the trial in the Court below admitted that "as a representative of the United States, I have certain papers which I assume were taken from the office of Mr. McDowell" (R. 81), and the petitioner urged that they be submitted to the Court who could have determined the question as to the private nature of the same had such a question been seriously raised, but the appellant objected to their submission to the Court. All that the petitioner requested was the return of private and personal papers, books, etc. Possession of the papers put it peculiarly within the power of the appellant to establish their real character, but he in his answer makes no allegation that any of the papers in his possession are the property of anyone other than the petitioner. His answer is cunningly drafted and evasively worded. In the fourth paragraph (R. 10) by adding a final modifying clause, which is entirely foreign to the allegation in the petition to which it purports to be an answer, he has devised an evasion by which he denies his possession of, and his intention to present to a Grand Jury any private papers of the petitioner, and without the insertion of that concluding

clause which is not responsive to the allegation in the petition he would have been compelled to admit the allegations of the petitioner. In the fifth paragraph of the answer (R. 10) the appellant has craftily evaded the allegations of petitioner (R. 5) by denying that the books and papers were stolen "*to* further and aid" a Grand Jury investigation, while the petition alleges that they were stolen "by certain persons participating in, furthering and aiding" the Grand Jury investigation. Had this paragraph of the answer been responsive to the petition this allegation of the petitioner would have had to have been admitted. Again in the sixth paragraph of the petition it is alleged that the appellant has used the stolen papers "as the basis and for the purpose of securing other evidence" (R. 6), while the evasive and irresponsive reply thereto in the seventh paragraph of the answer avoids an admission of the allegations of the petitioner by merely denying the success of his alleged purpose.

On the second proposition the appellant undertakes apparently to establish that the offense committed by the persons who looted McDowell's office and appropriated his private papers was something less than larceny, and a casual reading of his own argument seems to establish at least the offense of larceny by bailee. He does not claim a right of property in the alleged thieves but only a right of possesion to enable them to secure and select their own papers from the mixed private and corporation papers. In appellant's brief of argument (p. 17) appears this glaring misstatement of fact: "In the present case, McDowell's representative was allowed to be present and make a list or take copies of all papers

examined." This is absolutely untrue as appears from the uncontradicted testimony in the case including the admissions made by the alleged thieves. McDowell's private secretary testified that she was locked out of Room 1320 where the records were located after March 24, 1920 (R. 47, 50), and Winans, one of the alleged thieves admitted this (R. 31), and Krull, one of the detectives employed by the alleged thieves, was even refused the opportunity of listing the papers taken from the large safe after it had been drilled, although he had been directed by his employer to do so (R. 68, 70).

Appellant's third proposition might be available had the question of the competency of the stolen papers as evidence been raised for the first time during the trial of a criminal case. It is recognized that a Trial Court will not suspend the trial of a case to determine the collateral question of the ownership of papers. In the case at bar, however, we have an entirely different situation. The issue in this proceeding was the title and right of possession of certain private papers alleged to have been stolen. The right to private property can be as effectually asserted against the government as it can against an individual, and the government has no greater right to stolen property than the private citizen. The receiver of stolen goods has no right superior to the right of the thief and the officer or agent of the government who receives stolen goods is in no better position to retain the fruits and advantages of the crime than the humble private citizen.

Brief.

In the case of *Boyd vs. United States*, 116 U. S., 624, Mr. Justice Bradley says "In the case of stolen goods the owner from whom they were stolen is entitled to their possession," and it is this right which the appellee asserted and secured in the Court below.

In the Weeks case (232 U. S., 398) Mr. Justice Day said:

> "The right of the Court to deal with papers and documents, in the possession of the District Attorney and other officers of the Court and subject to its authority, was recognized in *Wise vs. Henkel*, 220 U. S., 556."

Consequently the right which the appellee asserted was a right which the Court had jurisdiction to recognize and preserve.

At the time this proceeding was instituted in the Court below the appellee was without knowledge as to the actual persons who had pilfered his office and taken his papers. He did know that the appellant had possession of some of the papers that were unlawfully taken. Discovery was necessary before it could be determined whether legal or constitutional rights or both had been violated, and in the seventh paragraph of his petition (R. 6) he averred that the possession of said papers by the appellant "is unlawful and in violation of the legal and constitutional rights" of petitioner. Practically all of the testimony that was taken was the testimony of unfriendly witnesses who were employees

of Henry L. Doherty and Company and who had participated directly or indirectly in the stealing of the papers. When this discovery was had it was ascertained by the appellee for the first time just who had stolen his papers and how the theft was accomplished. With this discovery had, the assertion of legal rights only was necessary to compel the judgment of the Court.

The Courts of the United States are open to the citizen for the enforcement of his legal and constitutional rights, and the right to private property may be asserted as a mere legal right or it may be asserted under the guarantees of the constitution.

Abuses of individuals involving the deprivation of the right to the possession, use and enjoyment of private property are adequately redressed by the assertion of the legal rights of the individual in either courts of law or equity. The resort to the limitations of the constitution may be necessary to curb the excesses of the Government.

In the case at bar there can be no question but that replevin would lie against both the thief and the receiver of the stolen goods to recover the private property of the appellee. In a case of this nature and under the circumstances of this case the legal remedy by replevin would have been inadequate as the injury could not be measured in damages. The remedy at law being inadequate it was necessary to resort to the equitable powers of the Court. The fact that the appellant happened to be an officer or employee of the Government provided no immunity to him that could prevent the

owner of private property from asserting his legal rights in either a court of law or equity.

Quite to the contrary, the very fact that he was an officer of the Court enlarged rather than diminished the authority of the Court to exercise control over and deal with the stolen papers which had come into his possession as such officer of the Court.

In this case the proceeding is properly a much more summary proceeding than in a case against a stranger to the Court where the formality and difficulty of securing jurisdiction over both the person and the property might be involved.

The right of a Court of Equity to order and decree the return of private property and papers is well recognized, as is illustrated by the following cases:

In the case of *McGowin vs. Remington*, 12 Pennsylvania State Reports, 56, a Bill in Equity was filed to recover possession of certain notes made by a surveyor and the Court decreed their return specifically. The syllabus in this case is as follows:

> "1. Where the law does not afford adequate redress by compensation in damages for the detention of personal chattels, equity will remedy the injury by decreeing their return specifically.
>
> 2. Where the chattels, whose specific return is sought, consist in part of a kind whose detention cannot, and in part of a kind whose detention can, be adequately compensated in damages, the

detention covering both kinds as one transaction, the jurisdiction and remedies of equity will attach to the whole."

In the case of *Dock vs. Dock*, 180 Pennsylvania State Reports, 15, it is held:

"Letters written by one person to another are the latter's property, and he has a right not only to have them produced for use in litigation, but delivered up to him as the true owner.

A writer of letters has a special property in them to prevent their publication or communication to other persons for use for any illegal purpose by the party wrongfully in possesion of them.

A bill in equity charged that the defendant surreptitiously and illegally took from the trunk of plaintiff's son and from plaintiff's own bureau certain letters written by plaintiff to her son, and by her son to her. Held, that the special right in the letters written by plaintiff was one that could only be adequately protected in equity, and that the court having jurisdiction for discovery should go on and order all the letters to be restored."

In the case of the *Pressed Steel Car Company vs. Standard Steel Car Company*, 210 Pennsylvania State Reports, 464, it is held that:

"Where a car manufacturing company delivers to its customers blue prints in connection with the orders for cars for the information and use of the

purchasers as a necessary part of the transaction, and also for their use in ordering repair parts, and the customers deliver the blue prints to a rival car manufacturing company so that the latter might use them in manufacturing and selling cars and car parts, the latter company will be compelled by a court of equity to surrender up such blue prints to the former company."

The situation in the case at bar was most excellently summarized by the Court below near the conclusion of the trial when he said (R. 81):

> "Of course we have only heard one side of the question, but if the testimony offered on the part of the petitioner is to be believed there was a grossly improper violation of the private rights of somebody. And the property is stolen property. There is no question about it if the evidence is to be believed. And if it is stolen property it belongs to the person from whom it was stolen no matter whether in the hands of the United States or in the hands of a burglar in the penitentiary. * * * These papers are alleged to be the property of the petitioner and the Court has the power and authority to order papers belonging to anybody if they are stolen to be returned to the person from whom they were stolen. They are subject to the order of the Court."

The appellant offered no evidence in contradiction or extenuation but merely demurred to the appellee's evidence (R. 98) and therefore the evidence at the con-

clusion of the case remained as it stood at the time the foregoing remark was made by the Court. It is therefore contended that the judgment of the Court below was entirely proper and that the reason which the Court assigned for the entry of that judgment, to wit, that:

> "The order made in this case is not made because of any unlawful act on the part of anybody representing the United States or any of its departments, but solely upon the ground that the Government should not use stolen property for any purpose after demand made for its return;"

furnishes not only an adequate reason for the judgment which was entered, but completely negatives every contention of the appellant as to the jurisdiction of this Court and the propriety of reversing the judgment of the Court below.

This is an independent proceeding having for its purpose the recovery of property in an equitable proceeding. The law side of the Court provided no adequate remedy. The Court in adjudicating the case properly found that the papers had been stolen; that they were private and personal papers of the appellee, and that they were in the hands of an officer of the Court, and that the owner was entitled to their return. Up to this point no constitutional question is involved. It is, however, respectfully submitted that had the Court below refused under the evidence and the facts in this case to have ordered the return of said books and papers and dismissed the proceeding, and if subsequently a criminal proceeding had been instituted against the appellee and the stolen books and papers been admitted

in evidence over objection, then appellee would have been denied the constitutional right guaranteed him under the 5th amendment to the constitution in that he would have been "compelled in" a "criminal case to be a witness against himself."

It is respectfully submitted that if this conclusion is not correct then a means has been found by which private prosecutors and complainants and those personally interested in the prosecution and persecution of alleged offenders can, by the mere acquiescence of the Government, deprive citizens of the United States of the constitutional rights guaranteed to them by both the 4th and 5th amendments.

It is respectfully contended that the appeal in this case should be dismissed.

A. M. IMBRIE,
E. LOWRY HUMES,
RODY P. MARSHALL,
Attorneys for Appellee.

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IN THE

Supreme Court of the United States

NO. 646 OCTOBER TERM, 1920.

JOSEPH A. BURDEAU, Special Assistant to the Attorney General, Appellant,

vs.

J. C. McDOWELL, Appellee.

On Appeal from the District Court of the United States for the Western District of Pennsylvania.

Motion to Dismiss Appeal.

And now, March ....., 1921, comes Jesse C. McDowell, defendant in the above entitled case, by his attorneys, A. M. Imbrie, Rody P. Marshall and E. Lowry Humes, and respectfully moves the Court to dismiss the appeal heretofore allowed in this case, for the following reasons, to wit:

The decision or judgment of the Court below directing the impounding in the hands of the Clerk of the District Court of the private and personal books, papers, memoranda, letters, copies of letters, corre-

spondence, diaries and other data of the defendant in error, and their subsequent return to him is not of such a character as to entitle the plaintiff in error to have said decision or judgment reviewed by the Supreme Court on appeal under the provisions of Section 238 of the Judicial Code (36 Stat. L 1157 as amended 38 Stat. L. 804) in that,

(a) The jurisdiction of the District Court is not in issue nor is it properly before this Court were it in issue.

(b) The decision or judgment appealed from does not involve "the construction or application of the Constitution of the United States."

A. M. IMBRIE,
RODY P. MARSHALL,
E. LOWRY HUMES,
Attorneys for Jesse C. McDowell, Appellee.

Notice of Submission of Motion to Dismiss Appeal.

To Honorable William L. Frierson, Solicitor General for the United States, Appellant in Error:

Please take notice that the foregoing motion, together with the brief of argument hereto attached, will be submitted to the Supreme Court of the United States on Monday, the ..... day of March, 1921, at the Capitol, in the City of Washington, D. C., at the opening of the Court on that day, or as soon thereafter as counsel can be heard.

A. M. IMBRIE,
RODY P. MARSHALL,
E. LOWRY HUMES,
Attorneys for Appellee.

Service of above notice, with copy of said motion and brief attached, accepted....., 1921.

.....

Statement of Facts Upon Which Defendant's Motion Is Based.

Jesse C. McDowell, for many years a Consulting Engineer, residing in Pittsburgh, was employed among others by Henry L. Doherty & Company of New York.

He was an officer and director in the Quapaw Gas Company, a company that was controlled by Henry L. Doherty & Company, which formerly had its General Offices in Pittsburgh, but had removed all offices therefrom several years ago. (Record page 46.) Mr. McDowell maintained two private offices in the Farmers Bank Building, Pittsburgh. The lease for one office which was used as a reception room was in the name of Mr. McDowell. The lease for the other was by arrangement with Henry L. Doherty & Company, taken in the name of the Quapaw Gas Company as part of Mr. McDowell's compensation from Henry L. Doherty & Company, and was for Mr. McDowell's private use.

In this room Mr. McDowell had since about 1913, kept his private office, desk, safe, files and most of his private papers and records, and it was occupied by him exclusively. All the furniture therein including desk, chairs, filecases, safes and other office furniture was the private property of Mr. McDowell, and there was no part of the furnishings of the office which belonged to Henry L. Doherty & Company or the Quapaw Gas Company.

On March 24, 1920, this office and its contents were forcibly taken possession of by parties representing Henry L. Doherty & Company and the Quapaw Gas Company.

On July 15, 1920, he discovered that his safe had been drilled, bored and forcibly opened, and his desk jimmied and broken open and everything therein carried away, together with his maps, furniture, and everything in the office belonging to him had been stolen.

Shortly before instituting this equitable proceeding, Mr. McDowell discovered that many of his private papers, etc., which had been stolen from his office, were in the possession of Joseph A. Burdeau, in his capacity as Special Assistant to the Attorney General, and assigned by the Attorney General to conduct a Grand Jury investigation in the Western District of Pennsylvania. That the appellant was using these private papers in interviewing prospective witnesses in the proposed Grand Jury investigation. He learned that the parties who had taken his papers were seeking the aid of the Department of Justice and were using the stolen papers and books to further that end. Until after the hearing in the lower court, he had no definite information as to whether the taking of his papers had been by private individuals for themselves or by the government officers and agents, in whose possession he ascertained them to be. He therefore caused this proceeding to be instituted in this lower court (page 5 of record) for the purpose (a) of making discovery as to the facts, and (b) recovering the stolen property. He was convinced at the time that government agents had undoubtedly been partly responsible for the illegal seizure and appropriation thereof.

The appellant in his answer (Record, page 9) admitted possession of a portion of said private and personal papers, denying their personal and private character, and partially informing the court as to the

manner in which they had been taken by the persons from whom the appellant had received them. The testimony taken by the appellee in the court below was largely the testimony of unfriendly witnesses, and it clearly established, as the court below in its opinion (Record, page 2) found, that the private and personal books, papers and records of the appellee had been stolen by the officers, agents and employees of Henry L. Doherty & Company, and that said stolen property had been delivered by them to the appellant, Joseph A. Burdeau, Special Assistant to the Attorney General, who knew that they had been illegally taken from the appellee (Record, pages 75, 90, 91). The court thereupon made the decree from which this appeal is taken, specifically basing the decree "solely upon the ground that the government should not use stolen property for any purpose after demand made for its return."

This appeal was taken without reference being made to the question of the jurisdiction of the court below in either the petition for the appeal (Record, page 104), or in the order allowing the appeal (Record, page 104). The question of the jurisdiction of the court below has not been certified to this court. The assignments of error (Record, page 105) aver in various forms that a question of the construction and application of the Constitution of the United States is involved, although the court below bases its opinion on entirely other and independent grounds, viz: "That the government should not use stolen property for any purpose after demand made for its return."

Statement of the Questions Involved in Defendant's Motion.

(a) Is the question of the jurisdiction of the District Court reviewable by the Supreme Court in the absence of a certification of that question by the District Court and when the question does not appear either in the opinion and decree of the Court below or in the order allowing the appeal?

(b) Will an appeal lie direct to this Court in an equitable proceeding in which the opinion and decree of the District Court specifically states the ground of its decision, and the ground thus assigned involves none of the questions designated in Section 238 of the Judicial Code from which the appellate jurisdiction of this Court in this case must arise?

Argument in Behalf of Appellee's Motion to Dismiss.

By the process of elimination it is apparent that the only two grounds upon which it would be possible for appellant to assert the jurisdiction of the Supreme Court to review the decision of the Court below in this case under Section 238 of the Judicial Code as amended by the Act of January 28, 1915 *(36 Stat. 1157; 38 Stat. 803),* are (1) that "the jurisdiction of the Court is in issue" and (2) that "the case involves the construction or the application of the Constitution of the United States."

This motion denies that the limited jurisdiction of this Court can be maintained in this case upon either ground.

It is respectfully asserted that only the Circuit Court of Appeals has jurisdiction to review the judgment in this case.

I.

(a) IS THE QUESTION OF THE JURISDICTION OF THE DISTRICT COURT REVIEWABLE BY THE SUPREME COURT IN THE ABSENCE OF A CERTIFICATION OF THAT QUESTION BY THE DISRICT COURT AND WHEN THE QUESTION DOES NOT APPEAR EITHER IN THE OPINION AND DECREE OF THE COURT BELOW OR IN THE ORDER ALLOWING THE APPEAL?

The question of the jurisdiction of the District Court is one of the only two possible propositions upon which the appellant may claim that the jurisdiction

of the Supreme Court can arise. If, however, the government proposes to raise the question it is essential that it should bring it properly before the Court. This we contend they have failed to do.

It has been repeatedly held by this Court that in order to maintain its appellate jurisdiction the record must distinctly and unequivocally show that the Court below sends up for consideration a single and definite question of jurisdiction, and that this question must appear either (1) by the terms of the decree appealed from and the order allowing the appeal; or (2) by a separate certificate of the Court below. In the case at bar there is nothing in the opinion and decree appealed from, nor in the order allowing the appeal, suggesting or presenting for the consideration of this Court the question of jurisdiction under Section 238 of the Judicial Code, nor has the Court below by separate certificate or otherwise sent up for the consideration of this Court the question of jurisdiction. The question of the jurisdiction of the Court below is not before this Court.

It is also contended that if the question of jurisdiction is in any way involved it is not the jurisdiction of the District Court as a Court of the United States, but only the jurisdiction and authority of a chancelor, under the facts presented, to make the order and decree from which this appeal is taken. That question is one for the Circuit Court of Appeals to review.

II.

(b) WILL AN APPEAL LIE DIRECT TO THIS COURT IN AN EQUITABLE PROCEEDING IN WHICH THE OPINION AND DECREE OF THE DISTRICT COURT SPECIFICALLY STATES THE GROUND OF ITS DECISION, AND THE GROUND THUS ASSIGNED INVOLVES NONE OF THE QUESTIONS DESIGNATED IN SECTION 238 OF THE JUDICIAL CODE FROM WHICH THE APPELLATE JURISDICTION OF THIS COURT IN THIS CASE MUST ARISE?

This was an equitable proceeding as is evidenced by the fact that the government is seeking a review on appeal rather than by writ of error. The appellee at the time of instituting the proceeding knew that his office had been forcibly seized and that the office and all of its contents including a large quantity of private and personal books, papers, letters, correspondence, diaries and other property had remained in the physical possession and control of the trespassors from March 23, 1920, to July 15, 1920, and that at some time during that period all of said private and personal papers and records had been appropriated by either the persons holding forcible possession thereof or their agents or other persons. It was not until the 15th of July, 1920, that he discovered that all his private and personal property had been stolen and removed. The various persons who had access to this property were unknown to him. Whether private citizens or government agents were responsible for the forcible and illegal seizure he did not know. Sometime prior to July 15, 1920, however, he learned that complaints had been lodged with

the Department of Justice. A short time before he instituted this proceeding he learned from proposed government witnesses who were interviewed by the appellant that at least a portion of his private and personal papers and property were in the possession of the appellant, and that they were being used by the appellant for the purpose of securing other evidence to be used in prosecuting him in the Federal Court. Thereupon the equitable proceeding was instituted (1) for discovery as to who had actually stolen his private and personal property; (2) to recover such of it as was within the control and jurisdiction of the Court; (3) and to restrain the officers of the government from using the stolen property, which was illegally in their possession. The possession of these private papers by the appellant was certainly illegal, and if on discovery it had been ascertained that the seizure had been made by the appellant or other government agents, the constitutional as well as the legal rights of the appellee would have been violated.

To make discovery it was necessary to use unfriendly witness who had directly or indirectly participated in the raiding and looting of his office and the theft of his property. It was determined from this testimony that the persons who seized his property complained to and secured the aid of the Department of Justice on about June 11, 1920, or more than one month before the last of the property was appropriated by them and removed from appellee's office. It was clearly established and not denied that two safes were drilled and bored and a desk jimmied in order that the contents might be secured and appropriated by the

persons who complained to and secured the aid and assistance of the Department of Justice. No testimony was offered by the appellant. The court very properly held that the private and personal papers of the appellee had been stolen and that such stolen papers were in the hands of the appellant as Special Assistant to the Attorney General, and that his possession was illegal, and that the appellee was therefore entitled to the return of his property.

The sole ground upon which the District Court based its decree is found in the following paragraph of its opinion:

> "It is proper to state that, so far as appears in this proceeding, neither the said Joseph A. Burdeau nor any other officer or agent of the United States, or any of the departments, had anything to do with the search of the petitioner's safes, files and desk, or the abstraction therefrom of any of the writings referred to in the petition, and the order made in this case is not made because of any unlawful act on the part of anybody representing the Unted States or any of its departments but solely upon the ground that the Government should not use stolen property for any purpose after demand made for its return."

From this it is clear that the Court did not undertake to construe or apply the Constitution of the United States. As a chancellor the Court undertook to adjudicate the equities of the parties and as a further evidence of this single purpose of the Court the attorney that represented the persons who did the actual looting of appellee's office declined, at the Court's suggestion,

to enter an appearance and thereby submit his clients to the jurisdiction of the Court, they being residents and citizens of New York in attendance at court as witnesses. Undoubtedly had they submitted themselves to the jurisdiction of the Court the order would have been extended to include the return of the portion of the private papers of the appellee still remaining in their possession.

The question as to the construction and application of the constitution is injected into this record in only two ways.

(1) In the original petition of the appellee it is raised conditional upon the discovery sought, establishing that the illegal seizure and theft of the private and personal papers of the appellee was committed by or at the instance of the appellant or other agents of the government.

(2) In the assignments of error of the appellant, (Record, page 105) in his motion to dismiss (Record, page 100) and in consequence of his apparent misapprehension of the real nature of the proceeding, and his apparent conviction that the Court had no jurisdiction to decree the relief sought except upon the ground that the illegal seizure and theft of the private papers in question was committed by agents of the government.

The facts established at the trial eliminated the constitutional question from the petitioner's case, and the appellant cannot inject it into the case through his assignments of error or because of his misapprehension of the real issue that was presented to the Court after the facts were discovered.

This proposition seems to have been clearly adjudicated by this Court in the cases of *Ansbro vs. United States,* 159 U. S. 695 (697), in which the Court said:

> "A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument, but a definite issue in respect to the possession of the right must be distinctly deducible from the record before the judgment of the Court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally but necessarily and directly, that our jurisdiction can be invoked for that reason. *Borgmeyer v. Idler,* 159 U. S. 408; *Carey v. Railway Company,* 150 U. S. 170; *In re Lennon,* 150 U. S. 395; *Northern Pacific Railroad Co. v. Amato,* 144 U. S. 465, 472; *Sayward v. Denny,* 158 U. S. 180. An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the Court below and rulings asked thereon, so as to give jurisdiction to this Court under the 5th Section of the Act of March 3, 1891."

In *Cornell v. Green,* 163 U. S. 75, the Ansbro case is cited and emphasized.

In *Budzisz v. Illinois Steel Company,* 170 U. S. 41 (44), the Court, speaking through Mr. Justice Shiras, says, "Mere allegations to that effect not based upon the facts of the case do not create a case which we are authorized to review."

So in the case at bar the appellant's allegation that a constitutional question is involved is based purely upon his misapprehension of the real issues and not upon the actual facts presented, and the real questions adjudicated by the Court below.

Therefore, appellee's motion to dismiss should be allowed and the appeal dismissed.

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BURDEAU *v.* McDOWELL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

No. 646. Argued April 11, 12, 1921.—Decided June 1, 1921.

1. The United States may retain for use as evidence in the criminal prosecution of their owner, incriminating documents which are turned over to it by private individuals who procured them, without the participation or knowledge of any government official, through a wrongful search of the owner's private desk and papers in an office. P. 474.
2. The provision of the Fourth Amendment forbidding unreasonable searches and seizures refers to governmental action; the Fifth Amendment secures the citizen from compulsory testimony against himself by protecting him from extorted confessions and examinations in court proceedings by compulsory methods. P. 475.

Reversed.

APPEAL from an order of the District Court requiring that certain books and papers be impounded with the clerk and ultimately returned to the appellee, and enjoining officers of the Department of Justice from using them, or evidence derived through them, in criminal proceedings against him. The facts are stated in the opinion, *post*, 470.

The Solicitor General for appellant:

It was not shown that any book, paper, or other document which was the private property of appellee was delivered to or was ever in the possession of appellant.

It is difficult to see how it can be said, with any show of reason, that there was any stealing of books and papers in this case. Certainly there was no invasion of appellee's right of privacy. Everything that was taken into possession was found in the office of the company

itself, with the exception of a few papers which were in the private office of appellee, but which it is admitted related to the business of the company, and were, therefore, such papers as the company was entitled to have delivered to it. They were, in fact, delivered to its auditor by appellee's representative.

If the employee has left papers of his own commingled with those of the company, he certainly cannot be said to be the sole judge of whether a particular paper is his or belongs to the company. He has brought about a condition under which the company has the right to inspect everything in the office before allowing anything to be removed. The inspection, therefore, is entirely lawful, and any information of crime or other matters which may be thus acquired is lawfully acquired and may properly be used. In the present case, appellee's representative was allowed to be present and make a list or take copies of all papers examined. A paper furnishing evidence of crookedness in the conduct of the company's affairs certainly relates to a matter in which the company is interested; and if the unfaithful employee has left it in the company's files, or in the company's office, there is no principle of law under which he can lawfully claim the right to have it returned to him. He has parted with the private possession of it, and his surrender of possession has not been brought about by any invasion of his constitutional rights.

Even if it could be said that the company or its representatives stole these papers from the appellee, this would not preclude their use in evidence if they should thereafter come to the hands of the federal authorities. The court found, as the evidence clearly required, that no department of the Federal Government had anything whatever to do with the taking of these papers and that no federal official had any knowledge that an investigation of any kind was being made, nor did such knowledge

come to any federal official until several months later. It would scarcely be insisted by anyone that, if the Government should discover that someone has stolen from another a paper which shows that the latter has committed a crime, the thief could not be called as a witness to testify to what he has discovered. If the paper were still in his possession, he could be subpœnaed to attend and produce the paper. The same thing is accomplished when the Government, instead of issuing a subpœna duces tecum, takes the paper and holds it as evidence. The rightful owner, while it is being so held, is no more entitled to its return than one who has been arrested for carrying a pistol is entitled to have the pistol returned to him pending a trial.

It must always be remembered that "a party is privileged from producing the evidence but not from its production." *Johnson* v. *United States*, 228 U. S. 457, 458.

Moreover, the Fourth Amendment protects only against searches and seizures which are made under governmental authority, real or assumed, or under color of such authority. If papers have been seized, even though wrongfully, by one not acting under color of authority, and they afterwards come to the possession of the Government, they may be properly used in evidence. *Weeks* v. *United States*, 232 U. S. 383; *Gouled* v. *United States*, 255 U. S. 298; *Boyd* v. *United States*, 116 U. S. 616; *Adams* v. *New York*, 192 U. S. 585; *Johnson* v. *United States*, *supra*; *Perlman* v. *United States*, 247 U. S. 7.

Mr. E. Lowry Humes, with whom *Mr. A. M. Imbrie* and *Mr. Rody P. Marshall* were on the brief, for appellee:

The issue in this proceeding was the title and right of possession of certain private papers alleged to have been stolen. The right to private property can be as effectually asserted against the Government as it can against

an individual, and the Government has no greater right to stolen property than the private citizen. The receiver of stolen goods has no right superior to the right of the thief and the officer or agent of the Government who receives stolen goods is in no better position to retain the fruits and advantages of the crime than the humble private citizen. *Boyd* v. *United States*, 116 U. S. 616, 624; *Weeks* v. *United States*, 232 U. S. 383, 398. The right which the appellee asserted was a right which the court had jurisdiction to recognize and preserve.

The courts of the United States are open to the citizen for the enforcement of his legal and constitutional rights, and the right to private property may be asserted as a mere legal right or it may be asserted under the guarantees of the Constitution.

Abuses of individuals involving the deprivation of the right to the possession, use and enjoyment of private property are adequately redressed by the assertion of the legal rights of the individual in either courts of law or equity. The resort to the limitations of the Constitution may be necessary to curb the excesses of the Government.

In the case at bar there can be no question but that replevin would lie against both the thief and the receiver of the stolen goods to recover the private property of the appellee. But the legal remedy by replevin would have been inadequate as the injury could not be measured in damages. It was necessary to resort to the equitable powers of the court. The fact that the appellant happened to be an officer or employee of the Government provided no immunity to him that could prevent the owner of private property from asserting his legal rights in either a court of law or of equity. Quite to the contrary,—the very fact that he was an officer of the court, enlarged rather than diminished the authority of the court to exercise control over and deal with the stolen papers

which had come into his possession as such officer of the court.

In this case the proceeding is properly a much more summary proceeding than in a case against a stranger to the court where the formality and difficulty of securing jurisdiction over both the person and the property might be involved.

The right of a court of equity to order and decree the return of private property and papers is well recognized, as is illustrated by the following cases. *McGowin* v. *Remington*, 12 Pa. St. 56; *Dock* v. *Dock*, 180 Pa. St. 14; *Pressed Steel Car Co.* v. *Standard Steel Car Co.*, 210 Pa. St. 464.

This is an independent proceeding having for its purpose the recovery of property in equity. The law side of the court provided no adequate remedy. The court in adjudicating the case properly found that the papers had been stolen; that they were private and personal papers of the appellee, and that they were in the hands of an officer of the court, and that the owner was entitled to their return. Up to this point no constitutional question is involved. It is, however, respectfully submitted that had the court below refused under the evidence and the facts in this case to order the return of the books and papers, and dismissed the proceeding, and if subsequently a criminal proceeding had been instituted against the appellee and the stolen books and papers been admitted in evidence over objection, then appellee would have been denied the constitutional right guaranteed him under the Fifth Amendment to the Constitution in that he would have been "compelled in" a "criminal case to be a witness against himself." If this conclusion is not correct then a means has been found by which private prosecutors and complainants and those personally interested in the prosecution and persecution of alleged offenders can, by the mere ac-

quiescence of the Government, deprive citizens of the United States of the constitutional rights guaranteed to them by both the Fourth and Fifth Amendments.

MR. JUSTICE DAY delivered the opinion of the court.

J. C. McDowell, hereinafter called the petitioner, filed a petition in the United States District Court for the Western District of Pennsylvania asking for an order for the return to him of certain books, papers, memoranda, correspondence and other data in the possession of Joseph A. Burdeau, appellant herein, Special Assistant to the Attorney General of the United States.

In the petition it is stated that Burdeau and his associates intended to present to the grand jury in and for the Western District of Pennsylvania a charge against petitioner of an alleged violation of § 215 of the Criminal Code of the United States in the fraudulent use of the mails; that it was the intention of Burdeau and his associates, including certain post-office inspectors coöperating with him, to present to the grand jury certain private books, papers, memoranda, etc., which were the private property of the petitioner; that the papers had been in the possession and exclusive control of the petitioner in the Farmers Bank Building in Pittsburgh. It is alleged that during the spring and summer of 1920 these papers were unlawfully seized and stolen from petitioner by certain persons participating in and furthering the proposed investigation so to be made by the grand jury, under the direction and control of Burdeau as special assistant to the Attorney General, and that such books, papers, memoranda, etc., were being held in the possession and control of Burdeau and his assistants; that in the taking of the personal private books and papers the person who purloined and stole the same drilled the petitioner's private safes, broke the locks upon his private

desk, and broke into and abstracted from the files in his offices his private papers; that the possession of the books, papers, etc., by Burdeau and his assistants was unlawful and in violation of the legal and constitutional rights of the petitioner. It is charged that the presentation to the grand jury of the same, or any secondary or other evidence secured through or by them, would work a deprivation of petitioner's constitutional rights secured to him by the Fourth and Fifth Amendments to the Constitution of the United States.

An answer was filed claiming the right to hold and use the papers. A hearing was had before the District Judge, who made an order requiring the delivery of the papers to the clerk of the court, together with all copies memoranda and data taken therefrom, which the court found had been stolen from the offices of the petitioner at rooms numbered 1320 and 1321 in the Farmers Bank Building in the City of Pittsburgh. The order further provided that upon delivery of the books, papers, etc., to the clerk of the court the same should be sealed and impounded for the period of ten days, at the end of which period they should be delivered to the petitioner or his attorney unless an appeal were taken from the order of the court, in which event, the books, papers, etc., should be impounded until the determination of the appeal. An order was made restraining Burdeau, Special Assistant Attorney General, the Department of Justice, its officers and agents, and the United States Attorney from presenting to the United States Commissioner, the grand jury or any judicial tribunal, any of the books, papers, memoranda, letters, copies of letters, correspondence, etc., or any evidence of any nature whatsoever secured by or coming into their possession as a result of the knowledge obtained from the inspection of such books, papers, memoranda, etc.

In his opinion the District Judge stated that it was the

intention of the Department of Justice, through Burdeau and his assistants, to present the books, papers, etc., to the grand jury with a view to having the petitioner indicted for the alleged violation of § 215 of the Criminal Code of the United States, and the court held that the evidence offered by the petitioner showed that the papers had been stolen from him, and that he was entitled to the return of the same. In this connection the District Judge stated that it did not appear that Burdeau, or any official or agent of the United States, or any of the Departments, had anything to do with the search of the petitioner's safe, files and desk, or the abstraction therefrom of any of the writings referred to in the petition, and added that "the order made in this case is not made because of any unlawful act on the part of anybody representing the United States or any of its Departments but solely upon the ground that the Government should not use stolen property for any purpose after demand made for its return." Expressing his views, at the close of the testimony, the Judge said that there had been a gross violation of the Fourth and Fifth Amendments to the Federal Constitution; that the Government had not been a party to any illegal seizure; that those Amendments, in the understanding of the court, were passed for the benefit of the States against action by the United States, forbidden by those Amendments, and that the court was satisfied that the papers were illegally and wrongfully taken from the possession of the petitioner, and were then in the hands of the Government.

So far as is necessary for our consideration certain facts from the record may be stated. Henry L. Doherty & Company of New York were operating managers of the Cities Service Company, which company is a holding company, having control of various oil and gas companies. Petitioner was a director in the Cities Service Company

and a director in the Quapaw Gas Company, a subsidiary company, and occupied an office room in the building owned by the Farmers Bank of Pittsburgh. The rooms were leased by the Quapaw Gas Company. McDowell occupied one room for his private office. He was employed by Doherty & Company as the head of the natural gas division of the Cities Service Company. Doherty & Company discharged McDowell for alleged unlawful and fraudulent conduct in the course of the business. An officer of Doherty & Company and the Cities Service Company went to Pittsburgh in March, 1920, with authority of the president of the Quapaw Gas Company to take possession of the company's office. He took possession of room 1320; that room and the adjoining room had McDowell's name on the door. At various times papers were taken from the safe and desk in the rooms, and the rooms were placed in charge of detectives. A large quantity of papers were taken and shipped to the auditor of the Cities Service Company at 60 Wall Street, New York, which was the office of that company, Doherty & Company and the Quapaw Gas Company. The secretary of McDowell testified that room 1320 was his private office; that practically all the furniture in both rooms belonged to him; that there was a large safe belonging to the Farmers Bank and a small safe belonging to McDowell; that on March 23, 1920, a representative of the company and a detective came to the offices; that the detective was placed in charge of room 1320; that the large safe was opened with a view to selecting papers belonging to the company, and that the representative of the company took private papers of McDowell's also. While the rooms were in charge of detectives both safes were blown open. In the small safe nothing of consequence was found, but in the large safe papers belonging to McDowell were found. The desk was forced open, and all the papers taken from it.

The papers were placed in cases, and shipped to Doherty & Company, 60 Wall Street, New York.

In June, 1920, following, Doherty & Company, after communication with the Department of Justice, turned over a letter, found in McDowell's desk, to the Department's representative. Burdeau admitted at the hearing that as the representative of the United States in the Department of Justice he had papers which he assumed were taken from the office of McDowell. The communication to the Attorney General stated that McDowell had violated the laws of the United States in the use of the mail in the transmission of various letters to parties who owned the properties which were sold by or offered to the Cities Service Company; that some of such letters, or copies of them taken from McDowell's file, were in the possession of the Cities Service Company, that the Company also had in its possession portions of a diary of McDowell in which he had jotted down the commissions which he had received from a number of the transactions, and other data which, it is stated, would be useful in the investigation of the matter before the grand jury and subsequent prosecution should an indictment be returned.

We do not question the authority of the court to control the disposition of the papers, and come directly to the contention that the constitutional rights of the petitioner were violated by their seizure, and that having subsequently come into the possession of the prosecuting officers of the Government, he was entitled to their return. The Amendments involved are the Fourth and Fifth, protecting a citizen against unreasonable searches and seizures, and compulsory testimony against himself. An extended consideration of the origin and purposes of these Amendments would be superfluous in view of the fact that this court has had occasion to deal with those subjects in a series of cases. *Boyd* v. *United States*, 116 U. S. 616; *Adams* v. *New York*, 192 U. S. 585; *Weeks* v.

United States, 232 U. S. 383; *Johnson* v. *United States*, 228 U. S. 457; *Perlman* v. *United States*, 247 U. S. 7; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; and *Gouled* v. *United States*, 255 U. S. 298.

The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.

In the present case the record clearly shows that no official of the Federal Government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been taken from him and was in the possession of the Cities Service Company. It is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another. A portion of the property so taken and held was turned over to the prosecuting officers of the Federal Government. We assume that petitioner has an unquestionable right of redress against those who illegally and wrongfully took his private property under the circumstances herein disclosed, but with such remedies we are not now concerned.

The Fifth Amendment, as its terms import is intended to secure the citizen from compulsory testimony against himself. It protects from extorted confessions, or examinations in court proceedings by compulsory methods.

The exact question to be decided here is: May the

Government retain incriminating papers, coming to it in the manner described, with a view to their use in a subsequent investigation by a grand jury where such papers will be part of the evidence against the accused, and may be used against him upon trial should an indictment be returned?

We know of no constitutional principle which requires the Government to surrender the papers under such circumstances. Had it learned that such incriminatory papers, tending to show a violation of federal law, were in the hands of a person other than the accused, it having had no part in wrongfully obtaining them, we know of no reason why a subpœna might not issue for the production of the papers as evidence. Such production would require no unreasonable search or seizure, nor would it amount to compelling the accused to testify against himself.

The papers having come into the possession of the Government without a violation of petitioner's rights by governmental authority, we see no reason why the fact that individuals, unconnected with the Government, may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character.

It follows that the District Court erred in making the order appealed from, and the same is

Reversed.

MR. JUSTICE BRANDEIS dissenting, with whom MR. JUSTICE HOLMES concurs.

Plaintiff's private papers were stolen. The thief, to further his own ends, delivered them to the law officer of the United States. He, knowing them to have been stolen, retains them for use against the plaintiff. Should the court permit him to do so?

465. Syllabus.

That the court would restore the papers to plaintiff if they were still in the thief's possession is not questioned. That it has power to control the disposition of these stolen papers, although they have passed into the possession of the law officer, is also not questioned. But it is said that no provision of the Constitution requires their surrender and that the papers could have been subpœnaed. This may be true. Still I cannot believe that action of a public official is necessarily lawful, because it does not violate constitutional prohibitions and because the same result might have been attained by other and proper means. At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play.